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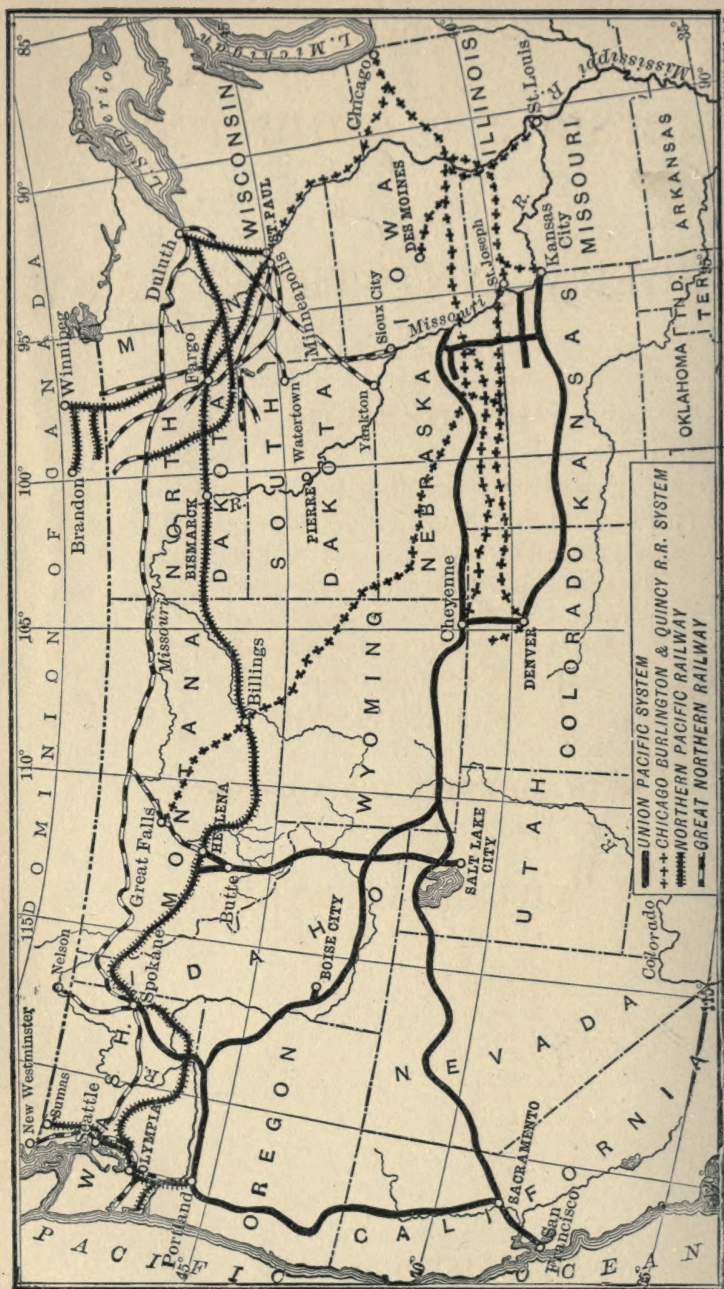


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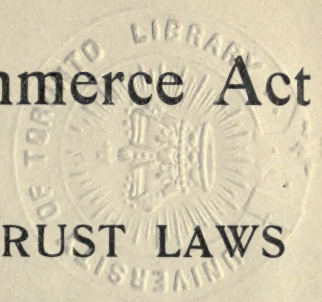


TERRITORY AFFECTED BY THE MERGER DECISION. SEE PAGE 280.



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THE  
Interstate Commerce Act  
AND  
FEDERAL ANTI-TRUST LAWS



INCLUDING

THE SHERMAN ACT,

THE ACT CREATING THE BUREAU OF CORPORATIONS;  
THE ELKINS ACT; THE ACT TO EXPEDITE SUITS IN  
THE FEDERAL COURTS; ACTS RELATING TO  
TELEGRAPH, MILITARY, AND POST ROADS;  
ACTS AFFECTING EQUIPMENT OF CARS  
AND LOCOMOTIVES OF CARRIERS EN-  
GAGED IN INTERSTATE COMMERCE,  
WITH ALL AMENDMENTS.

WITH COMMENTS AND AUTHORITIES

BY  
*amartine*  
WILLIAM L. SNYDER,  
OF THE NEW YORK BAR.

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NEW YORK:  
BAKER, VOORHIS & COMPANY.  
1904

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## PREFACE.

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Congress, in the exercise of its power to regulate interstate commerce, in 1887 passed the first general law on the subject, which was approved February 4th of that year. The act is entitled "An Act to Regulate Commerce." In 1890 this Commerce Act was supplemented by an act to prohibit contracts in restraint of trade, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. This act is known as the Sherman Anti-Trust Law. It is universal in its application, and embraces not only carriers, but manufacturers and producers.

The principal object of the Interstate Commerce Act was to give to every man engaged commercially equality of opportunity, and to place all shippers as to rates and tariffs upon an absolute equality. The principal evil complained of, which complaints finally resulted in the passage of the Commerce Act, was the practice of discrimination by the great carrying and transportation companies, whereby they gave to certain favored shippers an unjust and unreasonable preference and advantage, by carrying their goods and commodities at a less rate than was given to their competitors. This discrimination enabled the favored shippers to undersell their competitors, destroy competition, and drive out of business thousands who had spent their lives in acquiring mercantile training, and had invested their means in mercantile pursuits.



Indeed in some instances it has been shown that the favored shippers directly benefited, were also officers and directors of the carrying companies giving the rebates.

The discrimination complained of was not confined to favoritism to individual shippers. Communities and localities were discriminated against by giving lower freight rates to points at a much greater distance from the point of origin, in the same general direction, thus enabling merchants in a particular locality to make prices which their competitors in less favored localities could not meet. The result was ruin to many business communities. Cities and towns on a line of railway were built up at the expense of other cities and towns. Merchants in one locality were discriminated against in favor of those in another to an extent that practically compelled those discriminated against to relinquish business. Equal opportunity was denied. Trusts and monopolies were the legitimate fruits of such discrimination. The favored shipper also became the favored manufacturer.

The discrimination aimed at included also discrimination among carriers themselves, who in some instances denied to competing connecting lines equal facilities for through transfers and connections.

The beneficial results which had been anticipated by those through whose instrumentality this remedial legislation had been secured were not realized. Prior to 1903, the statutes relied upon to secure the remedy were found to be difficult to enforce, due in a measure to the delay in securing an interpretation of the law by the Supreme Court of the United States. Commercial enterprises and business activity could not survive the



long delays which necessarily resulted. While the measure of relief was suspended, pending appeals from the Circuit Court to the Circuit Court of Appeals, and thence to the Supreme Court of the United States, not months only, but years elapsed. The delay amounted practically to a denial of justice. The merchant and shipper, who was unable to compete with a rival, favored by secret rebates, was in many instances unable to surmount the discouragements and difficulties, arising from conditions for which there seemed to be practically no redress.

It was plain that in order to secure the beneficial results of the existing body of legislation, additional legislation was necessary. The President of the United States, HON. THEODORE ROOSEVELT, in his message to Congress in December, 1902, referring to the subject declared: "A fundamental base of civilization is the inviolability of property; but this is in no wise inconsistent with the right of society to regulate the exercise of the artificial powers which it confers upon the owners of property, under the name of corporate franchises, in such a way as to prevent the misuse of such powers." Supplemental legislation was urged to render the Commerce Act and the Sherman Anti-Trust Law useful and practical. The result was the important legislation of 1903.

This legislation embraced three important statutes, to wit: the act of February 11, 1903, to expedite suits by abolishing appeals to the United States Circuit Court of Appeals in cases in which the United States is complainant, and authorizing appeals in such cases to be taken directly from the United States Circuit Court to the Supreme Court of the United States, and

giving to such suits and appeals a right of preference over other pending litigation. A most important step, designed to minimize delay. The act of February 14, 1903, creating the Department of Commerce and Labor and establishing a Bureau of Corporations. This statute conferred upon the Commissioner of Corporations the same power conferred by the Interstate Commerce Act upon the Interstate Commerce Commission. The object of the law was to secure information and data by investigations instituted under the act with respect to corporations, joint-stock companies, and combinations other than carriers engaged in interstate commerce. The act of February 19, 1903, known as the Elkins Act, increasing the powers of the Interstate Commerce Commission and authorizing it to institute proceedings not only against carriers charged with the practice of unjust discrimination, but against all persons who receive rebates, or the benefits conferred by such discrimination, amplifying the powers of the Commission with respect to evidence and the compulsory production of books and papers, and extending the jurisdiction of Federal courts in cases brought to enforce criminal proceedings for violations of the act, by declaring that indictments might be found in any district in which the act was violated, "or through which the transportation may have been conducted."

The legislation of 1903 has made the commerce legislation available and practicable. The evils sought to be remedied under the law may be grouped as follows: Evils growing out of the combination of independent producing corporations engaged in the manufacture and sale of necessities of life, to fix and maintain extortionate prices, designed primarily to destroy competi-



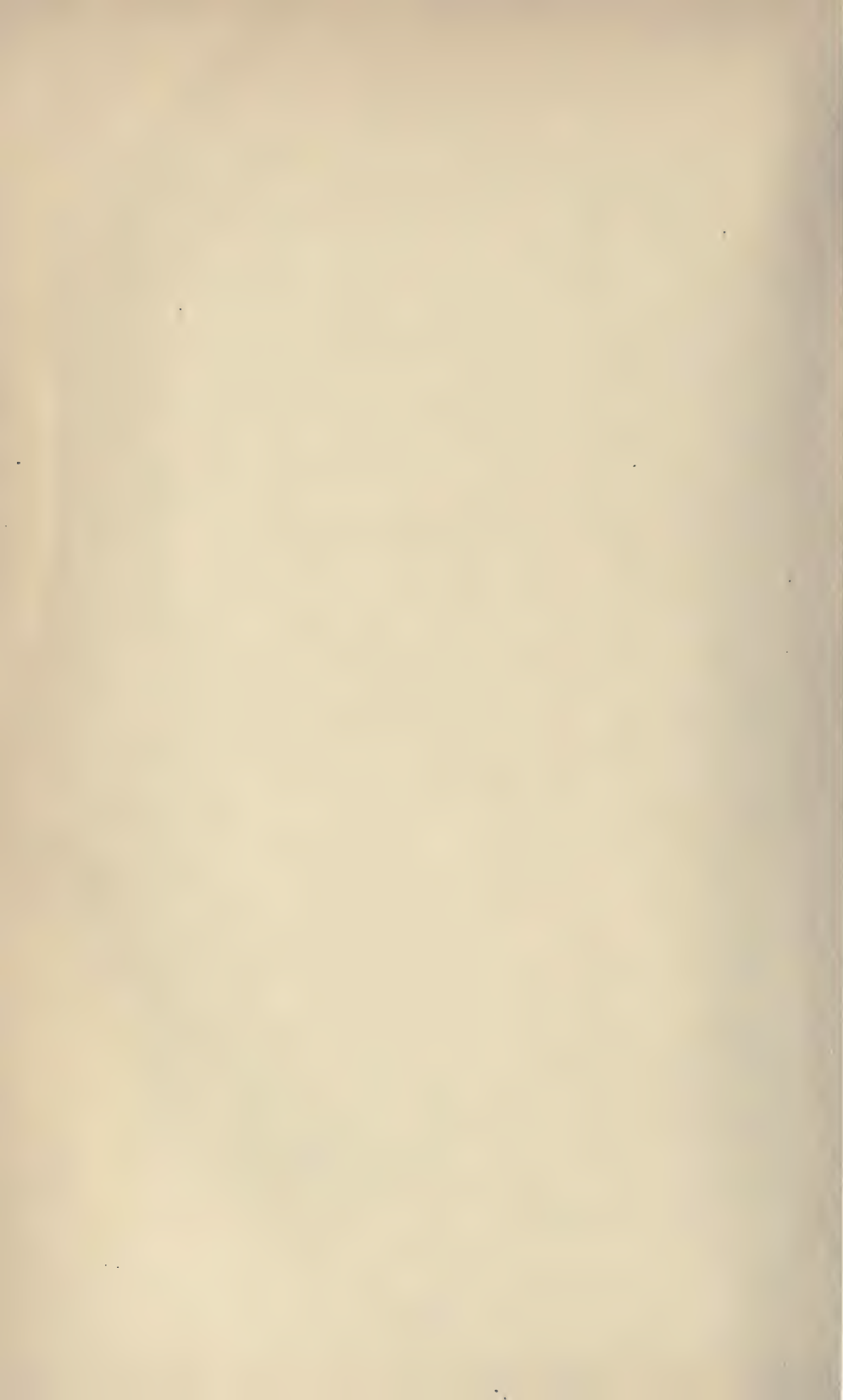
tors and drive out of business those not associated with the trust. Evils arising from merger of carrying corporations, designed to put the control of parallel competing lines of railroad in a single corporation and eliminate competition in rates of transportation, seeking thereby to accomplish more effectively the results sought to be accomplished by the pooling of freights among carriers, a practice expressly forbidden by section 5 of the Commerce Act.

The vital importance of this legislation is apparent. It operates upon the industrial world and affects the commerce of the country and the thrift and prosperity of the nation. Shall commerce be absorbed and controlled by particular combinations who exclude all others from participation therein. The controversies which have arisen under the Federal statutes on the subject, clearly demonstrated that such absorption is possible. The faithful enforcement of the acts of Congress seem to suggest the only remedy to secure active, healthy competition and afford to every man equality of opportunity.

Legislation is being sought also by the shippers and commercial bodies throughout the country to confer upon the Interstate Commerce Commission power to fix rates subject to review by the Circuit Courts of the United States. It is claimed that such legislation would be of more importance and practical benefit to shippers than any previous amendments to the act. A list of the bills which have been introduced to secure this remedy, which are now pending in the fifty-eighth Congress, will be found at page 193 of this work.

WILLIAM L. SNYDER.

TEMPLE COURT, NEW YORK,  
*July, 1904.*





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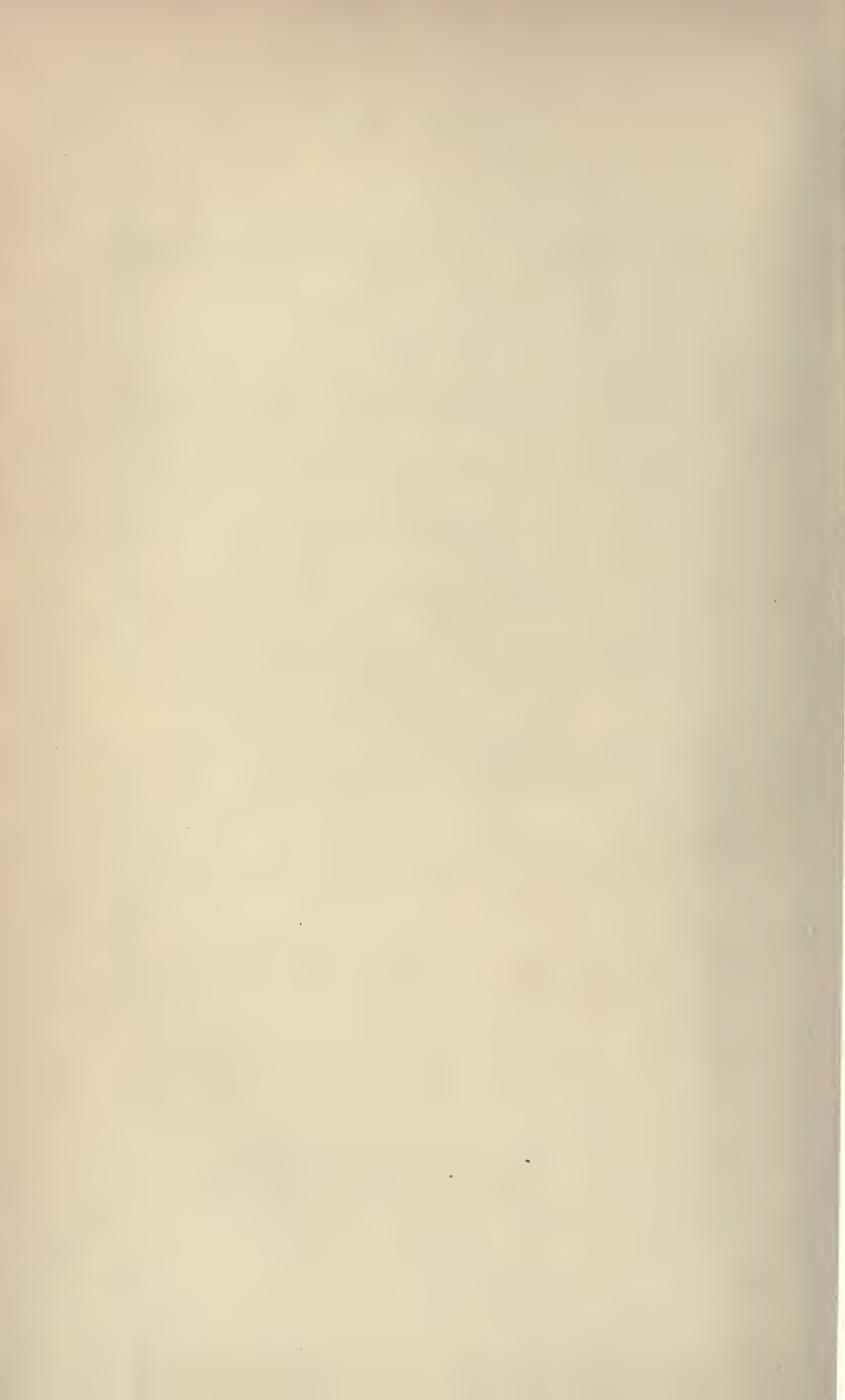
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1884. CHAP. 60. AN ACT for the establishment of a bureau of animal industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals. Approved May 29, 1884.
1887. CHAP. 104. AN ACT to regulate commerce. Approved February 4, 1887.
1888. CHAP. 772. AN ACT supplementary to the act of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, and also of the act of July 2, 1864, and other acts amendatory of said first-named act." Approved August 8, 1888.
1888. CHAP. 866. AN ACT to correct the enrollment of an act approved March 3, 1887, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the state courts, and for other purposes," approved March 3, 1875. Approved August 13, 1888.
1889. CHAP. 382. AN ACT to amend an act entitled "An act to regulate commerce," approved February 4, 1887. Approved March 2, 1889.
1890. CHAP. 728. AN ACT to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases. Approved August 8, 1890. WILSON ACT.
1891. CHAP. 128. AN ACT to amend an act entitled "An act to regulate commerce," approved February 4, 1887. Approved February 10, 1891.

1891. CHAP. 517. AN ACT to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Approved March 3, 1891.
1891. CHAP. 555. AN ACT to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, and for other purposes. Approved March 3, 1891.
1892. CHAP. 14. AN ACT to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States. Approved March 9, 1892.
1893. CHAP. 83. AN ACT in relation to testimony before the interstate commerce commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February 4, 1887, and amendments thereto. Approved February 11, 1893.
1893. CHAP. 196. AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes. Approved March 2, 1893.
1894. CHAP. 349. AN ACT to reduce taxation, to provide revenue for the government, and for other purposes. Became a law without the President's signature, August 27, 1894. Known as the Wilson Bill.
1895. CHAP. 61. AN ACT to amend section 22 of an act to regulate commerce, as amended March 2, 1889. Approved February 8, 1895.
1897. CHAP. 11. AN ACT to provide revenue for the government, and to encourage the industries of the United States. Approved July 24, 1897. Known as the Dingley Bill.
1900. CHAP. 553. AN ACT to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes. Approved May 25, 1900. LACY ACT.
1901. CHAP. 866. AN ACT requiring common carriers engaged in interstate commerce to make full reports of all accidents to the interstate commerce commission. Approved March 3, 1901.



1903. CHAP. 544. AN ACT to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted. Approved February 11, 1903. THE EXPEDITION ACT.
1903. CHAP. 552. AN ACT to establish the department of commerce and labor. Approved February 14, 1903.
1903. CHAP. 708. AN ACT to further regulate commerce with foreign nations and among the states. Approved February 19, 1903. ELKINS ACT.
1903. CHAP. 755. AN ACT making appropriations for the legislative, executive and judicial expenses of the government for the fiscal year ending June 30, 1904, and for other purposes. Approved February 25, 1903.



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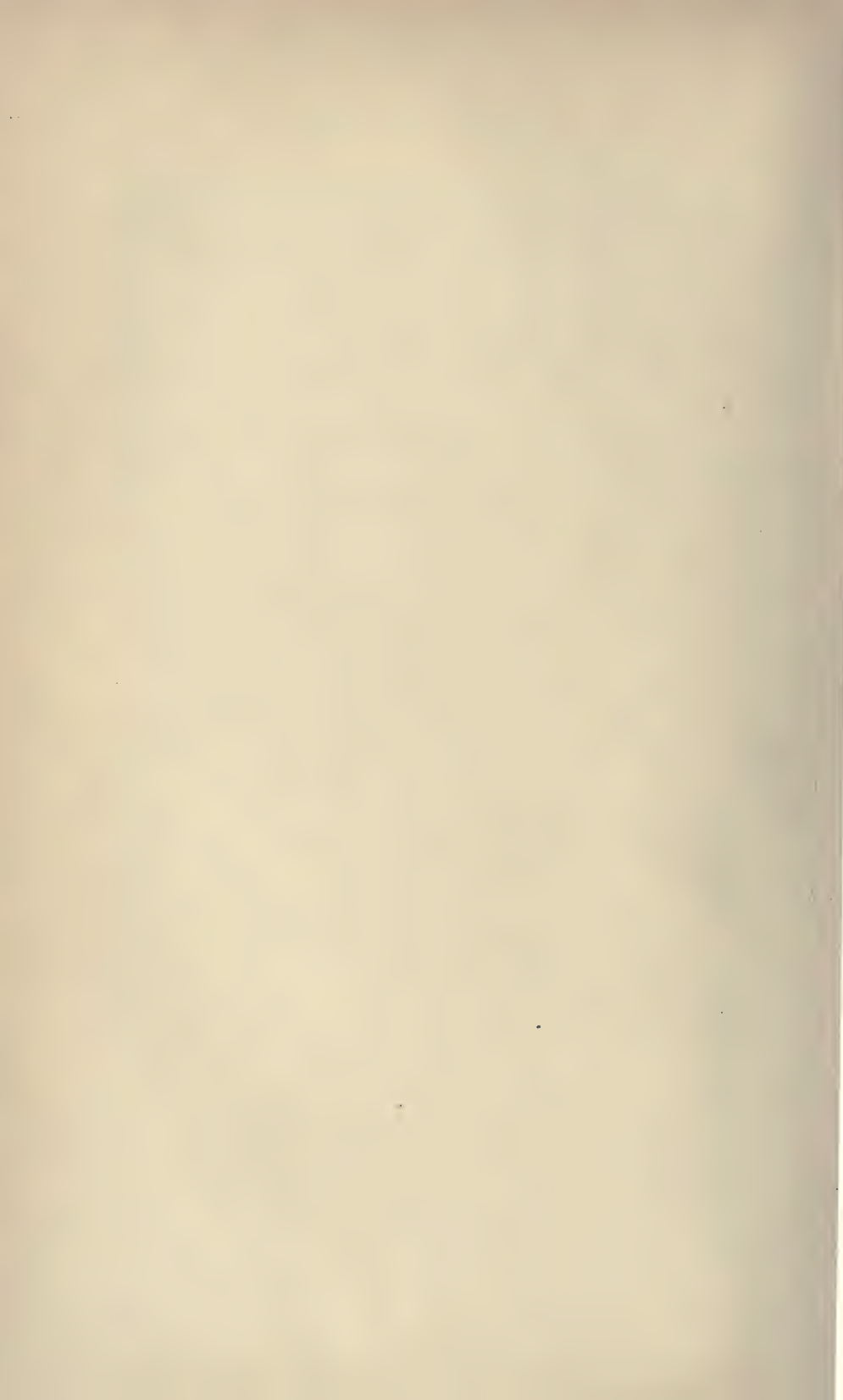
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Z.



## CHAPTER I.

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### **Constitutional Provisions, Involving Commercial Questions and Personal and Private Rights.**

In construing Federal statutes, designed to regulate interstate commerce, the courts must pass upon questions involving the limitation and extent of the powers delegated to Congress by the Constitution of the United States, and the powers which remain in the States or in the people, which were never delegated to the Federal government. These non-delegated powers embrace the right of a State to exercise its police power and to tax all property within its borders. They embrace the power to regulate domestic commerce or commerce conducted wholly within the State; the right of every citizen to trial by jury, as defined in the Federal Constitution; the right of a witness to be protected against self-incriminating testimony; the prohibition against the taking of life, liberty, or property without due process of law, and the right of every citizen to the equal protection of the laws, and to maintain the inviolability and integrity of every contract. Congress, in the exercise of the powers delegated to it, must frame its legislation so as not to impinge upon those powers remaining in the States, and so as not to deny or abridge the constitutional rights of any citizen.

A State has no power to legislate directly with respect to interstate commerce. Congress has no power to legislate with respect to domestic commerce. A



State cannot impose a tax upon interstate commerce. In the exercise of its power to tax, a State may tax, not only tangible property, but it may tax franchises conferred by it upon corporations of its own creation, notwithstanding the fact that such corporations may be engaged in interstate commerce. To what extent does this power extend when used to impose a tax upon tangible property employed as the means or instrumentalities of such commerce. To what extent may Congress legislate to raise revenue by imposing direct taxes which legislation impairs or diminishes the rights of the States to secure income from such source.

When commerce ceases to be domestic and becomes interstate, the power of the State to regulate or restrain it ceases and the power of the Federal government attaches. The statutes and local law of a State, with respect to domestic commerce, is supreme. An act of Congress, with respect to interstate commerce, is supreme. At what point and under what circumstances does State sovereignty cease and Federal authority begin.

Similar questions arise when an act of Congress is challenged upon the ground, either that it encroaches upon the police powers, which remain subject exclusively to the sovereignty of the State, or that it operates to deprive any person of life, liberty, or property without due process of law, or denies to any person the equal protection of the laws, or to the right to trial by jury, or compels a person to be a witness against himself, or impairs the obligation of a contract.

The chief constitutional provisions defining the powers delegated to the Federal government, and those reserved expressly to the States and which guarantee the rights of the citizen, are as follows:

## CONSTITUTIONAL PROVISIONS.

**Taxes.**— No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. Art. I, § 9.

Representatives, and direct taxes shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. Art. 1, § 2, as amended by amendment XIV, clause 2.

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. Art. I, § 8.

**Commerce.**— To regulate commerce with foreign nations, and among the several States. *Ib.*

**Post Roads.**— To establish post-offices and post roads. *Ib.*

**To Legislate.**— To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. *Ib.*

**No State Duty.**— No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another. Art. I, § 9.

**Privileges; Immunities.**— The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. IV, § 2.

**Congress Supreme.**— This Constitution, and the laws of the United States which shall be made in pursuance thereof; \* \* \* shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Art. VI.

**Seizure and Search.**— The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Amendment IV.

**Witness against Himself.**— No person \* \* \* shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. Amendment V.

**Jury Trial.**— In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Amendment VII.

**Powers Reserved.**— The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Amendment X.

**Due Process of Law.**— No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV.

The courts have construed these provisions of the organic law in connection with the various acts of Congress relating to interstate commerce and State legislation with regard to domestic commerce. Decisions bearing directly upon the statute will be found under the appropriate section of the act under which the discussion arose. Decisions which relate generally to the powers of Congress or the States, affecting commercial questions, and which do not relate to any particular clause of a Federal or State statute involving the power to regulate commerce, are, for convenience, grouped in this chapter.

**The Police Power.**— The people in framing the Federal Constitution did not delegate to Congress power to regulate the internal policy of a State, with respect to public health, public morals, or public order, within its borders. The power of the State to legislate as it sees



fit, in regard to these matters, is supreme. This power cannot be impaired or diminished by an act of Congress, even though its exercise may operate indirectly upon, or incidentally affect, interstate commerce. This rule is illustrated by the following authorities:

**Police Power — State Legislation — Prohibiting Sale of Game and Fish.**— A State may in the exercise of its police power prohibit the sale of trout within its borders, although such trout were lawfully caught in another State. A law making it a penal offense for a person to have such trout in his possession for sale is valid and not an unlawful interference with interstate commerce. *In re Deininger*, 108 Fed. Rep. 623 (April, 1901, C. C. Ore.); *Geer v. Connecticut*, 161 U. S. 519, followed.

Petitioner, who was convicted under the Oregon statute, applied for writ of *habeas corpus* and an order directing the sheriff to show cause why the writ should not be granted. Petitioner was manager of Cholpeck Fishing Co. at Portland, Ore., where it conducted a retail fish market. Trout were purchased in Seattle, Wash., where they were lawfully caught and shipped to petitioner to sell. Petitioner contended that the Oregon statute making possession of trout for sale, lawfully caught in another State, a penal offense, was invalid, as being in restraint of interstate commerce. The court denied the petition, and held that game brought from one State into another the moment it reaches the State of its destination, becomes part of the property within its borders, and subject to the control of the State in the exercise of its police powers, and that the statute complained of was a lawful exercise of such police power and was valid, and not an infringe-

ment upon the provisions of the Interstate Commerce Act. *Ib.*

**State Game Laws — Consent of Congress to Enforcement of.**  
— With a view to allowing full force to the game laws of the several States, designed to protect wild game, and to prohibit the killing of certain birds and animals during particular seasons, Congress passed a law known as the Lacy Act, approved May 25, 1900 (Stat. 1900, chap. 553). This law was intended to make effective State game laws, in the same manner that the Wilson Act (Approved August 8, 1890) was intended to give force and effect to the sumptuary laws of the several States, with respect to the purchase and sale of intoxicating liquors. The Lacy Act provides as follows:

Section 3.—That it shall be unlawful for any person or persons to deliver to any common carrier, or for any common carrier to transport from one State or Territory to another State or Territory, or from the District of Columbia or Alaska to any State or Territory, or from any State or Territory to the District of Columbia or Alaska, any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the State, Territory, or District in which the same were killed:

*Provided,* That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the State, Territory, or District in which the same are killed.

That all packages containing such dead animals, birds, or parts thereof, when shipped by interstate commerce, as provided in section one of this Act, shall be plainly and clearly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages. For each evasion or violation of this Act the shipper shall, upon conviction, pay a fine of not exceeding two hundred dollars; and the consignee knowingly receiving such

articles so shipped and transported in violation of this Act shall, upon conviction, pay a fine of not exceeding two hundred dollars; and the carrier knowingly carrying or transporting the same shall, upon conviction, pay a fine of not exceeding two hundred dollars.

That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

This Act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl. (Statutes 1900, chap. 553, approved May 25, 1900; 31 Stat. at L. 187.)

Interesting questions have arisen under the game laws of the States, based upon the proposition that game is property, and that neither the State nor Federal Legislature can, by statute, deprive any person of property without due process of law. This elementary rule, however, is subject to the exercise of the police power, which authorizes the Legislature to prohibit the sale of articles of food which would be injurious to the public health. These statutes for the protection of game frequently make it a crime to "catch, kill, or be possessed of" game or fish in the close season. Possession of birds in the forbidden season, in violation of a State statute, is *prima facie* evidence that the possessor has violated the law. The burden is then on the party possessing to show that his possession is legal. He may show that he purchased the game in another State, at a time when it was law-



ful to kill and possess it in his own State; that he brought it into his own State, when it was lawful for him to possess it there; that after importing it he kept the merchandise in storage, and had it for sale, thereafter, and during the forbidden season, when by the statute his possession of it was declared unlawful. In such cases, assuming the game is wholesome and fit for food, the question arises whether the Legislature can make the purchase and possession of property a crime.

For State authorities construing laws of this character, see *People v. Bootman*, N. Y. Sup. Ct., First Dept., App. Div., June, 1904; *Foster v. Scott*, 136 N. Y. 577; *People v. Buffalo Fish Co.*, 164 N. Y. 93; *State v. Bixman*, 162 Mo. 1; *State v. Intoxicating Liquors*, 9 Me. 140; *Starace v. Rossie*, 69 Vt. 303; *Commonwealth v. Savage*, 155 Mass. 278; *Manger v. People*, 97 Ill. 320; *Roth v. State*, 51 Ohio St. 209; *People v. O'Neill*, 110 Mich. 324; *State v. Rodman*, 58 Minn. 393; *Ex parte Maier*, 103 Cal. 476; *Price v. Bradley*, 16 Q. B. Div. 148.

**Police Power — Sunday Trains.**— Statutes enacted by the Legislature of a State for the orderly observance of the Sabbath day are within the police power. It is within their province to pass any law having for its object the protection of the health and morals of its people, and to promote their welfare and happiness. It may, by proper statutory regulations, prescribe a rule of civic duty, applicable to its own citizens, and to those who enter or sojourn within its borders, on the Sabbath. The State of Georgia passed an act regulating the running of freight trains within the State on Sunday (Code 1882, § 4578), which forbade the moving of freight trains on that day, except as pre-

scribed by the statute. The law was penal in its nature and declared a violation of the act to be a misdemeanor. The Supreme Court of the United States sustained the validity of the statute as a police regulation, and affirmed a judgment of conviction under it. The court emphasized the fact that the statute related to freight trains, in or passing through the State, and observed that it did not attempt to regulate through passenger traffic. While conceding that the statute did, to a limited extent, affect interstate commerce, it could not be said to be an attempt on the part of the Georgia Legislature to regulate interstate commerce, but must be regarded as a wholesome and reasonable police regulation, to promote the morals and welfare of its people. *Hennington v. Georgia*, 163 U. S. 299.

**Police Power — Jim Crow Cars.**— It is within the police power of a State to prescribe that separate coaches shall be supplied by carriers within its borders for colored patrons. Such a statute, which has no application to interstate commerce, but which applies only within the borders of the State, cannot be abrogated by a judgment of the Federal Court, if it appears that the Supreme Court of the State has construed the statute, and has declared that its provisions were intended to and could apply only to transportation to and from points wholly within the State. So held in reviewing a statute of Alabama (Approved March 2, 1888), which had been construed by the Supreme Court of Alabama to relate to passenger traffic wholly within the State. *Louisville Railway v. Mississippi*, 133 U. S. 587.

**Sumptuary Laws — Original Package Decision.**— In the exercise of its police power a State may pass laws to

regulate or prohibit the sale of intoxicating liquors. Such laws have been passed from time to time, and are being passed. In some States the sale of intoxicants as a beverage is forbidden. These laws however were evaded and to a limited extent practically defeated by dealers who shipped liquor from outside the State. While the goods so shipped remained in original packages and were not mingled with the mass of property in a State, they remained subject to Federal control. Such shipments were held to constitute interstate commerce.

**Sumptuary Laws — Wilson Act.**— In order that the sumptuary laws of the several States might operate freely, with respect to intoxicants shipped from one State to another, Congress on August 8, 1890, passed a law known as “the Wilson Act” entitled “An Act to limit the effect of the regulations of commerce between the several States and with foreign countries, in certain cases,” which provides as follows: “That all fermented, distilled or intoxicating liquors or liquids, transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”

Charles A. Rahrer, an agent of a Missouri firm of liquor dealers, sold in Topeka, Kan., liquors in original packages, immediately after the passage of the Wil-



son Act, shipped from Missouri to Topeka, without a permit or druggist's license required by the laws of Kansas. The Constitution of the latter State declared that the manufacture and sale of intoxicating liquors shall be forever prohibited therein, except for medical, scientific, and mechanical purposes; and the Kansas statute made it a misdemeanor to sell intoxicating liquors in the State, except for medical, scientific, and mechanical purposes; such sales to be made only by one having procured a druggist's permit.

Rahrer was arrested for selling liquor without a druggist permit, and sued out a writ of *habeas corpus*, and was discharged in the court below on the ground, as he contended, that the Kansas statute was not broad enough to embrace within its purview liquor imported from another State or country, and that the Kansas statute, after the passage of the Wilson Act, could not operate till re-enacted. The judgment was reversed by the Supreme Court, and the detention of Rahrer was held to be a valid detention. The court held that so far as imported liquors were concerned the law of Kansas, prior to the passage of the Wilson Act could not operate, because Congress had exclusive control of interstate commerce, but the moment Congress by the act of August 8, 1890, removed every obstacle to the operation of the State law, the latter became operative upon the merchandise within its borders, shipped from another State, and that a re-enactment of the Kansas statute after the act of Congress was not necessary. *In re Rahrer*, 140 U. S. 545.

**Liquors in Transit.**— The Wilson Act of August 8, 1890 (chap. 728, 26 Stat. 313), does not operate upon a con-

signment of liquors while the goods are *in transit*, but only when they reach the point of destination, or delivery to the consignee.

A statute of Iowa (Code, § 1553), forbade any common carrier, its agents, or servants to "transport or convey between points, or from one place to another within the State" of Iowa for any other person or corporation, any intoxicating liquors, without a permit as prescribed by the statute. A violation of the act was declared an offense punishable by fine. Liquors were shipped from Dallas, Ill., to William Horn, at Brighton, Ia. When the goods arrived at Brighton, Rhodes, the station agent of the carrier, removed the goods from the station platform to the freight warehouse. He was convicted under the Iowa statute on the assumption that under the Wilson Act of August 8, 1890, the laws of Iowa became operative as soon as the liquors crossed the Iowa State line, or, in the language of the statute, "upon arrival" in the State. The conviction was reversed by the United States Supreme Court upon the ground that the Interstate Commerce Act was operative while the goods were *in transit*. That the laws of Iowa became operative under the Wilson Act only when the liquors reached the point of destination and delivery to the consignee. That the act of Rhodes in depositing the liquor in the freight warehouse, prior to delivery to the consignee, was an act done while the goods were *in transit*, and that so much of the Iowa statute as affected the merchandise, or acts done in handling it while *in transit*, was void. (May, 1898.) *Rhodes v. Iowa*, 170 U. S. 412.

**Liquors for Private Use.**— The right to send liquors from one State to another, and the act of sending, is

interstate commerce. A citizen of one State has a right to purchase liquors in another State, to be sent to him in his own State, for his private use, and cannot be deprived of such right by statute. In the exercise of its police power, a State may forbid the sale of liquors therein.

A California corporation owning extensive vineyards, and engaged in the manufacture of wines and brandies in that State, sold liquors to citizens of Charleston, S. C., for private consumption. They consigned also to that city large quantities of liquor to be stored in its warehouse, and to be sold to its customers in original packages. The Charleston authorities, under a statute of South Carolina, known as the State Dispensary Law (Approved Jan. 2, 1895, as amended March 6, 1896, and March 5, 1897) attempted to seize and confiscate the liquors. The corporation filed a bill in equity in the United States Circuit Court and secured an injunction to restrain the State officers from seizing the liquor. The court below made the injunction perpetual, as to all the merchandise, on the assumption that while the liquors remained in original packages, the State law could not operate. The decree was reversed in part, by the United States Supreme Court, upon the ground that the injunction was proper, only in so far as to protect the liquor sent to South Carolina to citizens, not for sale by them, but for their private consumption. As to the liquors stored in complainants' warehouse, for sale in the State of South Carolina, the courts held that such liquors became subject to the provisions of the State Dispensary Law, by virtue of the operation of the Wilson Act of August 8, 1890; and as to such goods the order restraining the



State officers from seizing the liquors was reversed and the injunction vacated. (May, 1898). *Vance v. Vandercook*, 170 U. S. 438, citing *Scott v. Donald*, 165 U. S. 58.

**Grain Elevators — Power of State to Regulate.**—The Legislature of a State has power to control the business of elevating and storing grain, within its borders, when carried on by individuals or associations. And the exercise of such a power is not a regulation of interstate commerce. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoesser*, 153 U. S. 391.

The State of North Dakota passed a law (Laws 1891, chap. 126), entitled “An Act to regulate public warehouses and warehousing and inspection of grain and to give effect to Article 13 of the Constitution of the State fixing charges and fees.” One Brass owned and operated a grain elevator at Grand Harbor, N. D., for the purpose of buying, selling, storing, and shipping grain for profit. He refused to receive grain from Stoesser, unless the latter paid him therefor compensation in excess of the rate prescribed by the Dakota statute. The court issued an alternative writ of *mandamus* on Stoesser’s petition to which Brass made return claiming that he used the elevator for his own grain, and that he stored and shipped grain for others, for profit and gain, as a mere incident to his business. Stoesser demurred to the return, the demurrer was sustained, and the court issued thereon a peremptory writ. The Supreme Court sustained the judgment and held that the statute of North Dakota was valid, and was not a regulation of interstate commerce. That when Brass entered into the business of storing grain for others, for gain and profit, he was bound by the

statute, and could not escape its provisions by claiming that he also elevates and stores his own grain in the same warehouse. "As well might a person accused of selling liquor without a license," observes the court, "urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident." *Brass v. Stoesser*, 153 U. S. 391.

**Taxation.**— One of the most important questions which constantly arises involving the limitation of State and Federal authority, relates to taxation. The States never surrendered to Congress the power of direct taxation on property within the borders of a State. From the exercise of this power, the States derive their principal source of income. While the States retained the power to levy direct taxes within their borders, they gave Congress power "to lay and collect taxes, duties, imports, and excises." These are indirect taxes enforced by Congress in its various tariff laws. The States also gave Congress power to levy and collect direct or capitation taxes, according to the number of inhabitants in the respective States, counting the whole number of persons in each State, excluding Indians not taxed. All taxes levied by the Federal government must be uniform. The States also delegated to Congress the power to "regulate" commerce with foreign nations and among the several States. This latter grant of power precluded the States from taxing interstate commerce. The mode in which Congress could levy and collect a direct tax was discussed in the "income tax cases." (*Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 429; April, 1895); s. c., denying re-argument (May, 1895) 158 U. S. 601. See *infra*. The

other branch of the discussion, upon which the authorities are not entirely harmonious, relates to taxation upon interstate commerce, or rather upon instrumentalities engaged in interstate commerce.

**Taxation of Commerce — States Have No Power to Tax.—**

The power granted to Congress by the Constitution to regulate commerce among the several States is an exclusive power which Congress alone can exercise. Any State regulation therefore, which may in any wise affect interstate commerce, will be construed as an assumption on the part of the State to regulate commerce, and will be declared unconstitutional and void. While a State may tax all property and commodities within its borders and may regulate commerce which is conducted exclusively within its confines, it cannot levy a tax upon traffic or commerce when the conduct of such traffic extends beyond the State line. When traffic is conducted in such a manner as of necessity to extend in its operations from points in one State to points in one or more other States, it becomes interstate and can be regulated only by Congress, and it alone has power to occupy by legislation the whole field of interstate commerce.

Accordingly it has been held that for a State to pass any law imposing a tax upon "the transit of passengers from foreign countries, or between the States, is to regulate commerce." *Pickard v. Pullman Car Co.*, 117 U. S. 34.

Interstate commerce includes not only the exchange and transportation of commodities or visible tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. *Western Union Tel. Co. v. Pendelton*, 122 U. S.



347; *Rattan v. Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640.

The Legislature of Kentucky passed an act to regulate tolls to be charged or received from passengers over a bridge spanning the Ohio river extending from the Ohio shore to the Kentucky shore, between the cities of Cincinnati and Covington. The bridge was controlled by the Covington and Cincinnati Bridge Company, a corporation existing under the laws of both States. The Kentucky statute was held to be unconstitutional, as an assumption of the power to regulate commerce. The court observed that commerce embraced also intercourse “and the thousands of people who daily pass and repass over this bridge may be truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry, a tax upon the commerce across a river.” *Covington Bridge Co. v. Kentucky*, 154 U. S. 204.

The Legislature of Wyoming passed an act taxing all live stock brought into the State “for the purpose of being grazed.” Plaintiff owned a flock of sheep, which he designed to ship by rail from Pine Bluffs Station in the State of Nebraska. He drove the sheep from a point in Utah 500 miles across the State of Wyoming *en route* to Pine Bluffs. While the sheep were being driven through Laramie county, Wyoming, a tax of \$250 was imposed upon them under the Wyoming statute. Plaintiff sued to recover back the tax upon the

ground that it was imposed upon property engaged in interstate commerce, and the law authorizing it was unconstitutional. *Held*, that the sheep were not brought into Wyoming for the purpose of being grazed there permanently, but for the purpose of taking them to market in another State. That although the sheep were maintained by grazing along the route of travel and could have been shipped by rail directly from Utah, yet the owner had a right to avail himself of such means of transportation as he preferred. That his sheep were property engaged in interstate commerce which the State of Wyoming had no power to tax. *Kelley v. Rhoads*, 188 U. S. 1.

**Taxation — Federal Corporation.**— A State may create a transportation corporation. A railroad may be organized under the laws of a State, and may also receive aid from Congress, and may receive franchises pursuant to an act of Congress. If it appears that it was not the purpose of the Federal statutes in conferring franchises upon a State corporation to sever the allegiance which the corporation owes to the State, or to transfer the powers and privileges conferred by the State, the State has power to tax the property of the corporation within its borders; but the State cannot tax its franchises derived from Congress, nor include such franchises in the assessment on which the State tax is based. *Central Pacific Railroad v. California*, 162 U. S. 92.

The court in its opinion in the above case cited and commented on the authorities in *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394; *California v. Central Pacific Railroad*, 127 U. S. 1; *Railroad Co. v.*

*Peniston*, 117 U. S. 151; *Van Brocklin v. Tennessee*, 117 U. S. 177.

**Income Tax Cases.**— The several States, or the people of the United States, in conferring upon Congress the power to lay and collect taxes limited the power and defined the mode in which it should be exercised by providing (Article I, section 9) that “ no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.” Article I, section 2, of the Constitution (third clause), provides that Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union according to their respective numbers. The whole number of persons in each State shall be counted, Indians not taxed excluded. As amended by art. 14, § 2, ratified July 28, 1868.

The States reserved as their principal remaining source of income the power of direct taxation. Direct taxes include taxes on real estate, taxes on rents or income derived from real estate, taxes on personal property, and taxes on the income of personal property.

If Congress should exercise the power to impose a direct tax, such tax must be apportioned according to representation, and according to numbers. It can exercise the power in no other way.

The act of Congress, passed August 15, 1894, known as the Income Tax Bill entitled, “ An Act to reduce taxation, to provide revenue for the government and for other purposes ” provided for a tax of 2 per cent. on the amount derived over and above \$4,000, “ upon the gains, profits and income derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation carried



on in the United States or elsewhere, or from any other source whatever.”

*Held* to be a direct tax, within the meaning of the Constitution and void because not apportioned accordingly to representation and numbers, as prescribed by the Constitution. (April, 1895.) *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. 429; s. c., denying re-argument (May, 1895), 158 U. S. 601.

**Power of State to Tax — Unit Rule.**—The transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be subjected directly to State taxation. Property belonging to corporations or companies engaged in interstate commerce may be taxed by the State in which such property is located. And whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of government, under whose protection they conduct their operations; and taxation on property, collectible by the ordinary means, does not affect interstate commerce, otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government. *Adams Express Co. v. Ohio*, 165 U. S. 194; *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688.

**Unit Rule of Taxation.**— The Legislature of Ohio passed a law (Laws 1893, chap. 90, approved April 27, 1893), known as the Nichols Law, which provided a unit rule as to the value of the property of a corporation

existing in many States by declaring that the taxing officer, in fixing the value for purposes of taxation of the property to be taxed in Ohio, should be guided by the value of the entire capital stock of the company, and other evidence bearing on the true value in money of the entire property in Ohio, in the proportion which the same bears to the entire property, as determined by the value of its capital stock and other evidence. The validity of the law was assailed. The court sustained the law, and held that the statute did not require the tax officer to base the value for taxation purposes on the value of the entire capital stock, making the respective values equivalent; but taking market value of stock as a datum the board was to be guided thereby in ascertaining the true value in money of the company's property in the State. The fact that the property was valued as a unit was not objectionable. The value of property depends on the use it is put to, and it may be assessed at the value it has as used, and by reason of its use. *Adams Express Co. v. Ohio*, 165 U. S. 194.

For construction of a similar statute (Laws Indiana, chap. 171, approved March 6, 1893), under which value of the property of a telegraph company was taxed, on the basis of such a proportion of whole value of stock as length of lines within State bears to length of all lines, deducting sum equal to value of real estate and machinery, see *Western Union Tel. Co. v. Taggart*, 163 U. S. 1.

**Taxation of Property Used in Interstate Commerce.**— A State has power to tax all the property within its borders, if the tax imposed does not infringe upon the freedom of interstate commerce, or deprive those engaged

therein of the equal protection of the laws. *American Refrigerator Co. v. Hall*, 174 U. S. 70.

The constitutional and statutory provisions of the State of Colorado required the assessment of a tax on all property in the State owned, used, or controlled by railway companies, telegraph, telephone, and sleeping or palace-car companies. The Colorado authorities required all carriers to file annually a list of all its rolling stock used within the State and the proportion of rolling stock used upon leased lines, within the State, in detail. Plaintiff, an Illinois corporation, filed a bill in the District Court of Arapahoe county, Colo., to restrain the defendant Hall, treasurer of the county, from enforcing the payment of taxes imposed by defendant, assessed upon its refrigerator cars, used in the transportation of perishable freight over various lines of railroad throughout the United States, upon the ground that the tax was a State tax imposed upon interstate commerce, which the Legislature of Colorado had no power to impose. Plaintiff had judgment below awarding a perpetual injunction as prayed for, which judgment was reversed by the Supreme Court of Colorado. The carrier appealed to the Supreme Court of the United States which affirmed the judgment dissolving the injunction. It was stipulated on the record that if the tax was valid, the amount imposed was just and reasonable. The court held that the mere *situs* of the carrier's property could not be invoked to enable it to escape bearing in each State such burden of taxation as a fair distribution of the actual value of its property among those States requires. Citing *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Pullman Co. v. Pennsylvania*, 141 U. S. 18; *Adams Express Co. v. Ohio*, 165 U. S. 194.



Held further that the Colorado statute imposed no burden on the business of the carrier, but contemplated only an assessment of a tax upon property within the State, and that it was competent to ascertain the number of the cars to be subject to taxation by inquiry into the average number used in the State within the year; and the fact that the cars taxed were used as vehicles of transportation in the interchange of interstate commerce did not render the tax invalid. *Ib.*

See also authority sustaining a Pennsylvania statute (Approved June 7, 1879) authorizing a tax of 1-8 of 1 per cent. on gross receipts of railway companies for tolls and transportation on tracks within the State. *Erie Railroad v. Pennsylvania*, 158 U. S. 431.

An Ohio statute authorized a tax upon the tangible property of an express company within the State. Such tax is not a privilege tax. It is not a tax imposed for the privilege of doing business, but is a tax on tangible property within the State which the Legislature of the State has a right to tax. A franchise to be is only one of the franchises of a corporation. A franchise to do is an independent franchise, and is as much tangible property and a thing of value as the franchise to be. Rule as to mode of ascertaining tangible property of a corporation which a State may tax stated. *Adams Express Co. v. Ohio*, 166 U. S. 185; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150.

#### **Taxation of Property Used in Interstate Commerce, Continued.**

— There is a marked distinction in an attempt by a State or municipality to regulate or impose a burden on interstate commerce, and the taxing of property of a corporation engaged in interstate commerce. The borough of New Hope, Pa., passed an ordinance im-

posing an annual license fee of \$1 per pole, and \$2.50 per mile of wire on the telegraph, telephone, and electric-light poles, within the limits of the borough. It was claimed that such property, while it could not be excluded from the streets and avenues of the borough, is not exempt from the police regulations of the municipality. *Held* that such a license was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such, not in itself obnoxious to the commerce clause of the Constitution. *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, citing *St. Louis v. Tel. Co.*, 148 U. S. 92; 149 U. S. 465.

**Reasonableness Question for Jury.**— What would be a reasonable tax upon property of a corporation engaged in interstate commerce, which property justifies police supervision, in one locality, would not be regarded as reasonable in another. The question as to whether a tax ordinance is reasonable or unreasonable may be a question of law for the court, but the question as to whether the amount of the tax fixed by the ordinance is reasonable or not is usually a question of fact for the jury. *Atlantic Tel. Co. v. Philadelphia*, 190 U. S. 160.

The city of Philadelphia passed an ordinance imposing an annual license tax on the poles and wires of the Atlantic Telegraph Company, within the limits of the city. This ordinance fixed the license fees the same as the fees imposed by the borough of New Hope, in an ordinance sustained by the Supreme Court in the *New Hope* case, 187 U. S. 419, *supra*. But the court said that what might be reasonable in the borough of

New Hope might not be reasonable in the city of Philadelphia. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country. The reasonableness of the license was a question for the jury, unless the testimony was such as to compel a decision one way or the other, in which case the court might be justified in directing a verdict. *Ib.*

A Kentucky statute (Laws 1890, approved March 31st), declared that it should be unlawful for the Covington and Cincinnati Bridge Company, to charge, collect, demand, or receive for passage over the bridge spanning the Ohio river, with *termini* at Covington, Ky., and Cincinnati, O., any toll, fare, or compensation greater than the rates prescribed and designated in the act. The court held that the statute was a State regulation which imposed a tax on interstate commerce, and was void. That the traffic across the Ohio was interstate commerce, the bridge was an instrument of such commerce, and Congress alone could prescribe a uniform scale of charges. That the power of the Kentucky Legislature was limited to fixing tolls on such channels of commerce as are exclusively within its territory. *Covington Bridge Co. v. Kentucky*, 154 U. S. 204.

A Mississippi statute (Laws 1888, chap. 3, approved March 8th), authorized a revenue tax on business conducted within the State. The tax required to be paid by telegraph companies was \$3,000 on each company operating 1,000 miles or more of wire within the State, and if the company operated less than 1,000 miles, the tax imposed was \$1 per mile. The tax was declared to be "in lieu of other State, county and municipal



taxes." The court sustained the law in an action by a company engaged in interstate commerce, as a tax on the property of the company within the State, and not a tax on interstate commerce. *Postal Tel. Co. v. Adams*, 155 U. S. 688.

A statute of Alabama (Laws 1885, approved Feb. 17th, § 13) imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it," in the State of Alabama. The Western Union Telegraph Company did business in Alabama, and had accepted the provisions of §§ 5263-5268, U. S. Rev. Stat. It paid tax on gross receipts of all business done wholly within the State. It was required to return gross receipts on all business done partly within the State on messages carried partly within and partly without the State. *Held*, that the statute so far as it required returns on receipts for messages carried partly within and partly without the State was a regulation of interstate commerce, which the State had no power to enforce. *Western Union Tel. Co. v. Alabama*, 132 U. S. 472.

**Taxation of Commerce — Filing of Charter by Foreign Corporation.**— A State may lawfully pass a law requiring a foreign corporation as a condition precedent to transacting business therein, to file with its Secretary of State a copy of its charter, and pay a fee of \$25 for so doing. The State of Wisconsin passed such a law (Wisconsin Statutes 1898, §§ 1770b, 4978). The statute further provided that every contract made by such foreign corporation, affecting the personal liability thereof or relating to property within the State, before compliance with the statute should be void. *Held*, that such a statute did not necessarily operate to regulate

interstate commerce, so as to conflict with "the power of Congress in that regard," nor was a contract made intermediate the passage of the act and the date when it became operative, impaired by the provisions of the act. *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611.

**Tax on Dividends.**—The State of New York passed a law (Laws 1881, chap. 361) imposing a tax upon "the corporate franchise or business of corporations," measured by the extent of the dividends of the corporation. *Held* to be a privilege tax upon the right to be a corporation and do business in the State, and not a tax upon the privilege or franchise which, when incorporated, the company might exercise. That the New York law was valid, though a portion of the dividends may be derived from interest on capital invested in United States bonds. *Home Ins. Co. v. New York*, 134 U. S. 594.

**Taxation of Commerce — Drummers and Agents.**—The board of aldermen of the city of Greensboro, N. C., pursuant to a State statute, conferring power to do so, passed an ordinance assessing a license fee of \$10 a year on all persons in Greensboro engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face. The Chicago Portrait Co., an Illinois corporation, sold pictures in Goldsborough, and sent them to its agent in that city for delivery to purchasers. The agent failed to secure a license, under the Greensboro ordinance, and was convicted for a violation of the ordinance and fined \$10. The conviction was affirmed by the Supreme Court of North Carolina, and defendant appealed to the Supreme Court of the United States and claimed

that the Greensboro ordinance was void, as a tax by State authority on interstate commerce. The conviction was reversed upon the ground that transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce which cannot be subject to State taxation. *Caldwell v. North Carolina*, 187 U. S. 622.

It was urged that the tax or license fee was not confined to persons in other States, but was a uniform tax on all vendors in Greensboro, whether residents or nonresidents, and made no distinction between domestic and foreign drummers. The court held that this uniform provision did not meet the difficulty. That interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. Citing *The State Freight Tax*, 15 Wall. 232; *Stockard v. Morgan*, 185 U. S. 27; *Brennan v. Titusville*, 153 U. S. 289; *Robbins v. Shelby*, 120 U. S. 289; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Henrick*, 129 U. S. 141; *Lyng v. Michigan*, 135 U. S. 161; *Crutcher v. Kentucky*, 141 U. S. 47. And that efforts to control this kind of commerce, in the interests of States, where purchasers reside, in the form of statutes and ordinances have universally failed. *Ib.*

Although the State has general power to tax individuals and property within its jurisdiction, it has no power to tax interstate commerce, even in the person of a resident of the State. A statute of Tennessee imposed a privilege tax on persons and citizens in the State engaged in business, as brokers in merchandise. Complainants did business in Chattanooga as representatives of nonresident parties, firms, or corporations,



and solicited orders for goods from jobbers or wholesale dealers, for principals residing without the State. When such orders were obtained the nonresident principal shipped the goods to the Tennessee agents, who delivered them to the purchasers. *Held*, that the effect of the Tennessee statute was to impose a tax upon interstate commerce, and was void, as in violation of the interstate commerce clause of the Constitution. *Stockard v. Morgan*, 185 U. S. 27.

**Peddler's Licenses.**—A statute of Missouri (Rev. Stat. 1889, chap. 125) made it a misdemeanor for hawkers and peddlers selling goods by going from place to place to do so without procuring a license. The statute made no distinction between residents and non-residents. The defendant was convicted and fined for a violation of the statute, not having obtained a license. On appeal to the Supreme Court the conviction was affirmed and the statute upheld as a valid exercise of the power of the State over persons and business within its borders, regulating the occupation of itinerant peddlers and hawkers. The evidence showed that defendant sold sewing machines going from place to place in a wagon. There was no proof that he ever offered for sale a machine he did not have with him. His dealings were never accompanied nor followed by a transfer of goods from another State, or of an order for their transfer from one State to another. Defendant's transactions were neither interstate commerce, nor in any way connected with interstate commerce. The business was solely internal and domestic. *Emert v. Missouri*, 156 U. S. 296.

## CHAPTER II.

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### INTERSTATE COMMERCE ACT

ENTITLED

#### **"An Act to Regulate Commerce."**

[Approved Feb. 4, 1887. In effect April 5, 1887. U. S. Stat. at L. Vol. 24, p. 379.]

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#### ANALYSIS OF THE STATUTE.

- SEC. 1. Carriers engaged in transportation — Definitions — Terms, "Railroad," "Transportation" — Charges must be reasonable.
2. Unjust discrimination defined.
3. Unreasonable preference or advantage — Duty to connecting lines.
4. Long and short haul regulations — Power of Commission as to.
5. Pools and combinations prohibited.
6. Schedule of rates to be published — Rates through foreign country — Notice of advance or reduction of rates — Published rate only legal rate — Documents to be filed with commission — Notice of advance or reduction of joint rates — Power of commission to publish rates — Deviation from published rate unlawful — Forms of schedules — Penalties for failure to publish rates — Supplemented by Elkins Act — Approved February 19, 1903 — Violation of act misdemeanor — Penalty for violation of published rate — Soliciting or paying rebate a misdemeanor — Imprisonment abolished — Jurisdiction of federal court — Act of officer or agent — Act of carrier — Published rate, when conclusive — Parties to proceedings — Adherence to rate, how enforced — U. S. district attorney must prosecute at request of attorney-general — Immunity of witnesses — Expedition Act approved February 11, 1903, extended to such proceedings — Repealer.

- SEC. 7. Continuous carriage from point of shipment to point of destination.
8. Liability of carrier in damages.
9. Remedy of shipper in alternative by complaint to commission or suit in federal court.
10. Criminal liability of carrier for violation of act — Criminal liability of carrier for false bills, weights, or classification — Criminal liability of shipper for false bills, weights, or classification — Joint and several criminal liability of shipper and carrier.
11. Interstate commerce commission created.
12. Commission may prosecute through U. S. district attorney — Witnesses' attendance compulsory — Penalty for disobedience of witness — Testimony taken by deposition — Deposition, how taken — Foreign witnesses — Fees of witnesses — Supplemented — Act of February 11, 1893 — Immunity of witness — Perjury punished — Penalty for refusal to testify.
13. Complaint to commission, how made — Investigations, how conducted — Complaints by State railroad commissions.
14. Report of commission, how made — Report, how published.
15. Commission to notify carrier of violations of law — Compliance of carrier with notice, effect of.
16. Disobedience by carrier of order of commission, how punished — Power of federal court to issue injunction — Mandamus — Attachment — *Per diem* penalty not to exceed \$500 — Appeal to U. S. Supreme Court — Trial by jury — Jury may be waived — Supplemented — Act of February 11, 1903 — When United States a party, suit entitled to immediate hearing — Appeal to U. S. Supreme Court — U. S. Circuit Courts always open.
17. Procedure before interstate commerce commission.
18. Salary of commission — Fees and expenses.
19. Sessions of commission, where held.
20. Carriers must make annual reports to commission — Contents of reports — Uniformity of methods of keeping accounts — Supplemented — Act of March 3, 1901 — Carrier must make monthly reports of accidents.
21. Commission to make annual reports to Congress.



SEC. 22. Free or reduced rates — Excursions — Mileage — Commutation rates — Remedies cumulative not exclusive — 5,000-mile tickets — Penalties.

23. Remedy by mandamus to move traffic or furnish cars.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

**Section 1. Interstate Commerce Defined.**— That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

**Definitions — Railroad — Transportation.**— The term “railroad” as used in this act shall include all

bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

**Charges Must be Reasonable.**— All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

**Object and Scope of Section 1.**— Section 1 defines the persons and corporations to which the act applies, and which are bound by its provisions. It will be observed that the statute was framed to embrace only carriers and shippers engaged in interstate commerce. It has no application to domestic commerce, and so declares expressly. Any provision of an act of Congress assuming to regulate domestic commerce, that is commerce conducted wholly within the borders of a State, would be void, as the power conferred upon Congress by the Constitution in this regard is confined to commerce among the several States, and with foreign nations. The statute relates wholly to the rights, liabilities, and duties of carriers of passengers or property, and the rights and duties of shippers. It does not relate to persons or corporations engaged in the manufacture, production, and sale of commodities.

The Interstate Commerce Act has no relation to trusts or combinations in restraint of trade and commerce, in the manufacture, production, and sale of merchandise. Its provisions relate only to combinations in restraint of trade and commerce, when engaged in by carriers, with respect to rate making and pooling of freight charges, or contracts or arrangement among carriers of connecting and competing lines, which operate to

stifle competition or to discriminate against shippers or localities by giving undue preferences to some over others.

Congress in 1890 supplemented the Interstate Commerce Act by the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies" familiarly known as the Sherman Anti-trust Law. (See *post*, page 247.) This latter statute is of universal application. It affects not only carriers but embraces "every contract" or combination in restraint of trade or commerce among the several States.

The Sherman Act has been construed by the Supreme Court of the United States to embrace carriers and corporations operating lines of railroads, as well as persons and corporations engaged in the manufacture, production, and sale of commodities.

The provisions of the Interstate Commerce Act may now be read and studied in connection with the Sherman Act.

**Object of the Act.**— The primary object of the Interstate Commerce Act was to place all shippers and all localities upon an equality, and to compel the carrier to treat all alike, and to make its charges and tariffs for the carriage of persons and property uniform for like service performed under similar circumstances and conditions. It also requires all carriers operating connecting lines to be treated impartially with respect to facilities for interchange of traffic, and forbids discrimination in rates between connecting lines. It requires that all charges made by the carrier for any service shall be just and reasonable.

This provision of the act is mandatory. Unreasonable charges are not only forbidden, but are declared to be unlawful and subject the guilty parties to liabilities and penalties, both civil and criminal.

In this connection Judge BROWN, in *Interstate Com. Co. v. Baltimore Railroad*, 145 U. S. 263, reviewed the purpose and object sought to be accomplished by the passage of the act. He observes in substance that prior to the passage of the act a number of States had passed laws to secure the public against unjust and unreasonable discriminations. The inefficiency of the laws which could not operate as to commerce passing beyond the State line, the impossibility of securing uniformity of State



action, and the evils which grew up under a policy of unrestricted competition suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the States. The evils sought to be remedied by the act consisted principally in inequality of rates, refusal of carriers to furnish equal facilities to shippers, and connecting competing carriers. These evils were practiced and tolerated to promote individual interests, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line under like conditions, and to abolish combinations for pooling freights. The statute was not designed to prevent competition between different roads or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage. This is authorized and is lawful where the reduction does not operate as an unjust discrimination against others using the road. See *post*, section 22.

The object of Congress in enacting the Interstate Commerce Act was to facilitate interstate commerce and restrict the arbitrary power of the common carrier. The intention of the act was not to deprive the shipper of any right which he might have invoked in any court prior to the passage of the act. The intention clearly was to facilitate the shipper in securing such right by creating new and special remedies for that purpose. These new remedies were intended to supplement and not to supplant the remedies which existed before the act was passed. Section 22 expressly declares these remedies to be cumulative and not exclusive, and declares broadly that nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies. *Tift v. Southern*

*Railroad*, 123 Fed. Rep. 789 (July, 1903, Dist. Ct. So. Dist. Ga.).

The Supreme Court has also declared the object of the supplementary legislation embraced in the Elkins Act of February 19, 1903, to be to furnish a remedy which should operate retrospectively and that its provisions were applicable to actions or proceedings pending when the act was passed. *Missouri Pacific v. United States*, 189 U. S. 274.

**Common-law Rule.**—Prior to the passage of the Interstate Commerce Act railway traffic in the United States was governed by the principles of the common law applicable to common carriers “which,” says Justice BROWN, “demanded little more than that they should carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service, though the weight of authority in this country was in favor of an equality of charge to all persons for similar services.” *Interstate Com. Co. v. Baltimore Railroad*, 145 U. S. 263.

The Interstate Commerce Act created no new right in the shipper. At common law a carrier was bound to receive and transport all goods offered on receiving reasonable compensation for such carriage. The carrier at common law could not lawfully enforce unreasonable charges. The difference in the obligation of a common carrier and an individual, is that the former has undertaken a duty to the public. That duty imposed upon him the obligation to carry for all to the extent of his capacity, without unjust or unreasonable discrimination either in charges or in the facilities for actual transportation. *Tift v. Southern Railroad*, 123 Fed. Rep. 789 (July, 1903, Dist. Ct. So. Dist. Ga.).

The court in support of the proposition above set forth cited *Acheson v. Denver Railroad*, 110 U. S. 667; *Interstate Com. Co. v. Cincinnati Railroad*, 167 U. S. 479.

This common-law obligation of the carrier is even stronger upon carriers who receive valuable franchises from the public. The universal reliance of the public on the instrumentalities of modern commerce renders their operation indispensable to the

existence of modern social life. The act of Congress in so far as it prohibits and forbids the carrier from imposing unjust and unreasonable rates is an express adoption of the rules of the common law in this regard. By embodying this common-law right in the statute, Congress created no new right in the shipper, but provided for him a remedy in the Federal courts. *Ib.*

**Power to Regulate — Power to Prohibit — Term "Regulate."**

— The power conferred by the Constitution upon Congress is defined as power to "regulate" commerce among the States and with foreign nations. In construing the word "regulate" in regard to the extent and limitations of the power thus conferred, the question has been raised as to whether Congress may prohibit any branch of interstate commerce and whether the power to "regulate" authorizes power to prohibit. The Embargo and Non-intercourse acts of 1808 and 1809 grew out of the encroachments sanctioned or allowed by England upon the rights of American commerce which became open and hostile, and finally culminated in the second war with England in 1812. These statutes not only assumed to regulate commerce, but to prohibit it in certain respects. The Supreme Court of the United States never questioned the power of Congress to pass these laws, nor was it adjudged that Congress exceeded its powers in enacting them. *Schooner Paulina's Cargo v. United States*, 7 Cranch, 52; *Sloop Active v. United States*, 7 Cranch, 100.

The power of Congress to prohibit commerce was raised specifically in the lottery cases. (*Champion v. Ames No. 2*, 188 U. S. 321.) Congress passed an act (approved March 2, 1895, 28 Stat. L. 963, chap. 191) making it a penal offense to traffic in lottery tickets. The penalties imposed by the statute operated as a prohibition against such traffic. Defendant was indicted for a violation of the statute. He pleaded as a bar to the indictment the illegality of the statute, and claimed, among other things, that while Congress was given power "to regulate" commerce, no authority existed giving it power to prohibit commerce. Counsel argued, therefore, that the lottery statute was unconstitutional and void. The court sustained the law, and held in considering the validity of the statute the court must con-



sider the character of the traffic affected, and must determine whether it might constitute a nuisance or affect public health or morality. The court observed that there was no provision of the Constitution under which one could sustain a claim to engage in business which will result in harm to public morals. Congress, under the power to "regulate" commerce, may provide that it shall not be polluted. The liberty protected by the Constitution, embraces the right to be free in the enjoyment of one's faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper. But it is no part of one's liberty that he shall be permitted to introduce into commerce an element that will be confessedly injurious to public morals, such as trafficking in lottery tickets. *The Lottery Cases*, 188 U. S. 321.

As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress for the purpose of guarding the people of the United States against the "wide spread pestilence of lotteries," and to protect the commerce which protects all the States, may prohibit the carrying of lottery tickets from one State to another. In so far as such legislation may operate to prohibit such traffic it was declared to be valid and constitutional. *Ib.*

**Commerce Defined.**— In construing the scope and extent of the commerce clause of the Constitution, the word "commerce" is defined to embrace navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. *Lottery Cases*, 188 U. S. 321.

Interstate commerce includes not only the exchange and transportation of commodities or visible tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Rattan v. Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640.

**Commerce — Lottery Tickets.**— Lottery tickets have commercial value, even if the holder of such a ticket does not draw a prize; the ticket before the drawing has a money value in the market among those who choose to sell or buy it. Such tickets

are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State at least by express companies, or by independent carriers, is a regulation of commerce among the several States. *Lottery Cases*, 188 U. S. 321.

**Interstate Commerce — Domestic Commerce.**—The power conferred by the Constitution on Congress to regulate commerce is limited to commerce among the States and with foreign nations. Congress has no power over domestic commerce, or commerce conducted wholly within the borders of a State. Questions frequently arise with respect to what constitutes interstate commerce. To what extent can a State legislate with regard to instrumentalities of commerce, and property within it belonging to corporations engaged in interstate commerce; which corporations derive not only their existence, but their powers and franchises, not from any Federal statute, but from the laws of the State. These questions involve the validity of State laws imposing a tax on corporate property within the State used in interstate commerce. It is well settled that a State has no power to tax interstate commerce any more than Congress can legislate with regard to domestic commerce. Can a State impose a tax on property therein when such property is used by a State corporation engaged in interstate commerce? Can a State impose a tax on instrumentalities of interstate commerce within the confines of the State? The authorities on this point will be found more fully discussed in chapter I, relating to constitutional provisions bearing on the subject. See *ante*, pp. 21-26.

Many statutes have created railroad commissions and clothed them with power over domestic commerce, and imposed upon them duties in many respects like those which Congress has conferred upon the Interstate Commerce Commission. How far may these powers be exercised by State Railroad Commissions without conflicting with the powers exercised by the Interstate Commerce Commission? The authorities referred to below bear upon these questions.

**Jim Crow Cars — Not Interstate Commerce.**—A statute of Alabama (approved March 2, 1888) requiring carriers within the State (except street railroad companies) to provide sepa-

rate accommodations for white and colored passengers, which was construed by the Supreme Court of Alabama to apply solely to commerce within the State, is not a regulation of interstate commerce. See *ante*, page 9.

The construction of such a statute by the Supreme Court of Alabama is conclusive in the United States Supreme Court. *Louisville Railway v. Mississippi*, 133 U. S. 587.

**Interstate Commerce — What Constitutes.**— Oranges grown in Florida were shipped from the groves to a point within the State for the purpose of being immediately re-shipped and forwarded to their destination in other States. It was *held* that the shipments to the points in Florida, in transit, to points without the State was interstate commerce, and that such traffic was governed by the Interstate Commerce Act. That the rates prescribed by the Florida Railroad Commission, to wit, fifteen cents per box to the Florida points, were not binding on the carrier who prescribed the rate of twenty-five cents per box, and that in absence of proof that the rate charged by the carrier was not unreasonable it was a legal charge, and that tariff regulations prescribed by the Florida commission could not be enforced unless the carriers' rates were shown to be exorbitant or unreasonable. *Cutting v. Florida Railroad*, 46 Fed. Rep. 641 (June, 1891, Circ. Ct. No. Dist. Fla.)

**Interstate Commerce — Eminent Domain — Bridges.**— Congress may create corporations as appropriate means of executing the powers of government for promoting commerce among the States. And when it becomes necessary for the accomplishment of any object within the authority of Congress to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the State in which the lands lie. Congress may, if it sees fit, recognize and approve bridges erected by authority of two States across navigable waters between them, or it may, at its discretion, use its sovereign powers, directly or through a corporation for that object, to construct bridges for the accommodation of interstate commerce by land, as it may to improve navigation of rivers for the convenience of interstate com-



merce by water. *Luxton v. North River Bridge Co.*, 153 U. S. 525.

Congress, by act approved July 11, 1890, incorporated The North River Bridge Company, and authorized it to construct a bridge and approaches at New York city across the Hudson river, to regulate commerce in and over such bridge between the States of New York and New Jersey, and to establish such bridge as a military and post road. *Held valid. Ib.*

**State Railroad, when Bound by Act — Common Control.—**

When a railroad operating a line wholly within the State elects to enter into the carriage of interstate freight by participating in through rates and charges, and agreeing, in consideration thereof, to transport freight from other States over its line on through bills of lading, it becomes a party to an arrangement for continuous carriage or shipment from one State to another and is bound by the provisions of the Interstate Commerce Act. *Cincinnati Railway v. Interstate Com. Co.*, 162 U. S. 184.

The Georgia Railroad Company, operating a line extending from Atlanta easterly to Augusta, 171 miles, carried goods in connection with roads operating in other States, shipped from Cincinnati, Ohio, to Atlanta, Augusta, and intermediate points. The rate charged on through freight from Cincinnati was \$1.07 per hundred, whether shipped to Atlanta or Augusta. On goods shipped from Cincinnati to Social Circle, a point on the Georgia road 52 miles east of Atlanta and 119 miles west of Augusta, the rate charged on like freight was \$1.37 per hundred. The distance from Cincinnati to Atlanta was 474 miles, and to Augusta, 645. To Social Circle the distance from Cincinnati was 526 miles. The rate to Social Circle was made by adding to the through rate the local rate of thirty cents from Atlanta to Social Circle. Upon complaint the Commission made an order to the several roads directing them to desist from making any greater charge on like freight from Cincinnati to Social Circle than was charged from Cincinnati to Augusta. The order was disobeyed. In an action to enforce it the bill was dismissed, and this judgment was reversed in the Court of Appeals and the reversal was sustained in the Supreme Court.

The court *held* that the Georgia railroad was not justified in

adding the local rate to the through rate on goods shipped over its line on through bills of lading. That when goods are shipped from one State to another on through bills of lading, and are received by a State carrier, who participates in the rate and in the arrangement, the State carrier subjects itself to the provisions of the Interstate Commerce Act, and upon the evidence the Commission was justified in directing it to desist from charging more for a shorter than for a longer distance over the same line, in the same direction. *Ib.*

A shipper may invoke the provisions of the Interstate Commerce Act against discrimination in interstate shipments against a railway operating a belt line around a city, the railroad so operated being wholly within the limits of the State of Indiana, if it receives shipments over connecting lines from other States on through bills of lading. Such shipments constitute interstate commerce. *Interstate Stock Yards v. Indianapolis Railway*, 99 Fed. Rep. 472.

**Power of Congress and the States.**— The power to regulate commerce among the States and with foreign nations conferred by the Constitution upon Congress is supreme and exclusive. But this power must be exercised through the medium of Federal legislation. When Congress has legislated upon any particular branch of the subject such legislation is controlling. But until Congress legislates the local law or the statutes of a State upon a subject which may directly or indirectly affect a branch of interstate commerce not covered by a Federal statute will prevail, and will be enforced. *Pennsylvania Railroad v. Hughes*, 191 U. S. 477; *Missouri Kansas Railroad v. Haber*, 169 U. S. 613; *Smith v. Alabama*, 124 U. S. 465; *Cleveland Railroad v. Illinois*, 177 U. S. 514; *Chicago Railroad v. Solan*, 169 U. S. 133.

Judge HARLAN, in the *Haber* case, states the rule very clearly. He says: "Even if the subject of State regulations be one that may be taken under the exclusive control of Congress and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes." *Missouri Kansas Railroad v. Haber*, 169 U. S. 613.

In the case of *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, the carrier claimed the right to exempt itself from liability as a common carrier, or to limit its liability so as to conform to the terms and conditions prescribed in its printed bill of lading. There was no statute in Pennsylvania forbidding a carrier to assume to exempt itself from liability by clauses and conditions inserted in bills of lading issued by it. The Pennsylvania courts, however, held, in their construction of the common-law rule governing common carriers that the latter could not exempt themselves or limit their liability in that manner. Such was declared by the Supreme Court of Pennsylvania to be the law in that State, and was the policy of the law of that Commonwealth.

The action was against the carrier to recover the value of goods shipped. Upon the trial the court refused to hold that the liability of the carrier was limited to the amount designated in the bill of lading, and allowed the jury to find the value of the property, and held that the decisions of the courts of Pennsylvania, forbidding the carrier to assume to limit its liability in the manner claimed by it, was binding and operative, although the local law might affect directly or indirectly interstate commerce. Defendant appealed and the judgment was affirmed by the Supreme Court of Pennsylvania, 202 Pa. St. 222. Defendant sued out a writ of error to the Supreme Court of the United States, which affirmed the judgment.

The court held that the law of Pennsylvania, as interpreted by its courts, though it might affect in some way interstate commerce, was nevertheless binding until a Federal law was enacted with respect to the power or right of a carrier to limit its liability in the manner claimed by it. *Pennsylvania Railroad v. Hughes*, 191 U. S. 477.

**Reasonable Rates — Power of State to Prescribe.**— A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. A corporation, after



accepting a public franchise, cannot construct a public highway simply for its own benefit, without regard to the rights of the public. *Smyth v. Ames*, 169 U. S. 466.

A corporation, which accepts a public franchise to perform public services, and those financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. *Ib.*

A railroad corporation is a person within the meaning of the Fourteenth Amendment, declaring that no person shall be deprived of property without due process of law. A State, therefore, cannot by statute establish rates of transportation within its borders, which rate will not admit of the carrier earning such compensation, as under all the circumstances is just to it and to the public, and thus deprive it of its property without due process of law, and deny to it the equal protection of the laws.

The State of Nebraska passed a statute (Laws 1893, chap. 24, in effect August 1, 1894), entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act." The State authorities, under the statute, promulgated a schedule of tariffs and rates to be charged within the State, which the railroads claimed were too low to enable the carriers to receive a fair and reasonable return on the capital invested, and that the statute operated to deprive the carriers of their property without due process of law, and deprived them of the equal protection of the laws. The courts sustained the contention of the carriers and granted an injunction to restrain the enforcement of the Nebraska rates fixed by its officers under the statute, which was affirmed.

Judge HARLAN said, among other things: "That the basis of calculations as to reasonableness of rates by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, amount expended in permanent

improvements, amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case." The carrier is entitled to ask a fair return upon the value of its capital; and the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered by the carrier are reasonably worth. *Ib.*

The Union Pacific railroad is incorporated under a Federal statute (Act of July 1, 1862, chap. 120). One provision of this statute (section 18) provides that "Whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures including repairs, and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." *Held*, that Congress intended thereby to leave the question of the rates for local business, wholly within a State, to the control of the respective States through which the road might pass, with power reserved by Congress to intervene under certain circumstances and fix rates that the corporation could reasonably charge. The fact that the carrier was incorporated under a Federal statute did not preclude the State legislature from prescribing rates within its territory until Congress exercised its power to fix rates as provided by the act. *Ib.*

#### **Remedy of Carrier against State Commission — Injunction.—**

The remedy of a railroad company against a State Railroad Commission to prevent such commission from enforcing rates established by it on interstate commerce is by injunction. *Hanley v. Kansas City S. R. Co.*, 187 U. S. 617.

A State, through its Railroad Commission, cannot fix rates to be charged by a carrier for transporting persons or property

between points within such State, when it appears that the property carried was billed through to the point of destination, and was carried part of the distance through another State or territory, and subsequently brought to the place of destination within the same State. *Ib.*

Goods were shipped from Fort Smith, Ark., to Grannis, Ark., over defendant's road, by way of Spiro, in the Indian Territory. The freight charged was in excess of the rate fixed by the Railroad Commission of Arkansas for goods shipped from Fort Smith to Grannis. *Held*, that as the carrier transported the goods part of the distance through Indian Territory, the transaction, though the shipment was between points in Arkansas, was nevertheless interstate commerce, and was not subject to the rates fixed by the Railroad Commission of Arkansas. Case of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, relating to *taxation* on freight distinguished. *Ib.*

**Domestic Commerce — Right of State to Prescribe Joint Rates over Independent Lines.**— A State Railroad Commission, so far as regards domestic commerce, may control and supervise freight rates under joint traffic agreements between two or more independent railroads, as if such rates and charges related to transportation over a single line of road. When the rates prescribed by the State Commission are not unreasonable they can be lawfully enforced. *Minneapolis R. Co. v. Minnesota*, 186 U. S. 257.

**Interstate Commerce — Live Stock — When State Statute as to Will be Upheld.**— The transportation of live stock from State to State is interstate commerce, and any specific rule or regulation with respect to such transportation which Congress may lawfully prescribe or authorize, and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. When the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect to such matters and covering the same ground will cease to have any force, whether formally abrogated or not, and such rules or regulations as Congress may lawfully prescribe or



authorize will alone control. *Reid v. Colorado*, 187 U. S. 137, citing *Gibbons v. Ogden*, 9 Wheat. 1; *Morgan v. Louisiana*, 118 U. S. 455; *Hennington v. Georgia*, 163 U. S. 299; *New York, New Haven R. Co. v. New York*, 165 U. S. 628; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613; *Ramussen v. Idaho*, 181 U. S. 198.

The power which the State might thus exercise in this way, with respect to the treatment and inspection of live stock, may be superseded until national control is abandoned and the subject be thereby left under the police power of the States. *Ib.*

Congress, by the passage of the Animal Industry Act (Act May 29, 1884, 23 Stat. L., chap. 60), did not cover the entire subject of the transportation or shipment of diseased live-stock, known to be affected with any contagious, infectious, or communicable disease from one State to another. *Ib.*

Accordingly held that a statute of Colorado (Approved March 21, 1885), which prescribes methods to protect domestic animals of Colorado from coming in contact with live stock coming into its territory within certain dates, and authorizing the exercise of its police power to protect the property of its people from injury or disease, and which does not forbid the introduction into the State of *all* live stock, if not unreasonable, and is not shown to be in conflict with any law of Congress, is not necessarily void. *Ib.*

Plaintiff in error was indicted, under the Colorado statute, for failure to procure a certificate from the Colorado authorities. On the trial he put in evidence a certificate obtained from Arthur C. Hart, assistant inspector Bureau of Animal Industry, certifying that he had carefully inspected the cattle in question at Hereford, Tex., and found them "free from Texas or splenic fever infection (*Boophilis bovis*), or any other infectious or contagious disease, and that no Texas fever infection is known to exist where they have been kept, or on the trail over which they have passed. The certificate at bottom contained these words: "Animals which have been inspected and certified by the inspector of the U. S. Bureau of Animal Industry, and are free from disease, have the right to go into any State, and be sold for any purpose, without

further inspection or the exaction of fees." On the trial one of defendant's witnesses testified that the cattle had been inspected by a Colorado inspector against his will, and the reason he did not get a certificate from the State Board of Colorado "was because he would not pay the expense of such inspection, and because he had opposed such inspection as unnecessary and without any warrant of law." There was no evidence given to show the amount of these fees, or the unreasonableness of the Colorado statute in its operation. *Held*, that in the absence of evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the State of Colorado to protect its domestic animals, and it appearing that the Colorado statute was not, on its face, in conflict in any wise with the act of Congress (the Animal Industry Act), the statute of Colorado must be upheld and the conviction under it affirmed. *Ib.*

**Public Rates not Affected by State Regulations.**—A State cannot legislate upon subjects relating to interstate commerce, concerning which Congress has legislated. A statute of a State imposing a penalty on the carrier for failure to deliver goods on tender of the rate named in the bill of lading has no application to goods shipped from another State, and if the State statute conflicts with the act of Congress the latter alone is operative. *Gulf Railway v. Hefley*, 158 U. S. 98.

The Legislature of Texas passed a law (approved March 6, 1882) making it unlawful for a carrier to charge more for freight than the amount designated in the bill of lading, and directing the carrier to deliver freight upon payment of the rate so designated, and for refusal to do so upon tender, making the carrier liable in damages in a sum equal to the amount of the freight for each day's detention.

The Interstate Commerce Act (section 6) provides that carriers shall print, publish, and post at each station schedules of fares and rates and joint rates between connecting carriers. There was shipped to plaintiff at Cameron, Tex., from St. Louis, Mo., a carload of furniture, billed at sixty-nine cents per hundred. The printed tariff sheets of the carrier at Cameron designated the rate at eighty-four cents per hundred. Before the

shipment this public rate had been reduced to sixty-nine cents, but the new schedule of rates, showing this reduction, had not reached the agent at Cameron when the furniture arrived there. The shipper tendered the freight designated in the bill of lading, amounting to \$82.80. The carrier's agent detained the goods for one day, awaiting instructions from his superiors, and the carrier, under the Texas statute, became liable for \$82.80, which plaintiff sued for and recovered. On writ of error the judgment was reversed, on the ground that the Texas statute was inoperative, being in conflict with the provisions of the Interstate Commerce Act, which contained no such provision. *Ib.*

In the absence of the Federal statute the Texas statute might be upheld as a police regulation, but as Congress had legislated upon the subject, and the State law being in conflict with the Federal statute, the former must yield. *Ib.*

**Stoppage of Trains — When a Regulation of Interstate Commerce.**— A statute of Illinois (act approved March 31, 1874) provided that "Every railroad corporation shall cause its passenger trains to stop upon arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety; Provided all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety."

The State's attorney petitioned United States Circuit Court for a writ of *mandamus* to compel defendant to stop an express train, known as the "Knickerbocker Special," at Hillsboro, the county seat of Montgomery county. Defendant claimed that it furnished four regular passenger trains each way a day, which passed through and stopped at Hillsboro; and that the "Knickerbocker" was a through express, carrying interstate transportation between St. Louis and New York, and that by stopping at Hillsboro its schedule connections with other roads would be interfered with. Plaintiff demurred to the answer and the demurrer was sustained. On writ of error *held*, that the statute of Illinois, so far as the interstate transportation was con-



cerned, imposed a direct burden on interstate commerce, and was an attempt by the State to regulate interstate commerce, which the State had no power to do. *Cleveland R. Co. v. Illinois*, 177 U. S. 514.

The court declared that the distinction between the Illinois statute and a statute making regulations requiring passenger trains to stop at railroad crossings and draw-bridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring tracks to be fenced, and a bell and whistle to be attached, signal lights to be carried at night and tariff and time-tables to be posted at proper places, and similar requirements contributing to the safety, comfort, and convenience of patrons is too obvious to require discussion. *Ib.* Citing *Railroad Commission Cases*, 116 U. S. 307.

A statute of Illinois (Laws 1889, chap. 114, § 88) declared that railroad corporation should stop trains at places at which it advertised to stop, long enough to take on and let off passengers, "provided all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety."

Defendant formerly ran all its passenger trains to and from its depot and station in Cairo, the county seat of Alexander county, and made it its southern terminus. It afterward, jointly with the Chicago, St. Louis and New Orleans road, constructed a bridge across the Ohio, over which it was connected with the latter road, and put on a daily fast mail to run from Chicago to New Orleans, carrying also passengers. The bridge crossed the river two and a half miles north of its old station. Its fast mail ran through from Chicago to New Orleans, crossed the Ohio at Bridge Junction, three and one-half miles north of the station, and did not stop at its old depot in Cairo. Six regular passenger trains were run daily to the station in Cairo, giving adequate accommodations for passengers to and from Cairo. The court, under the statute, granted a *mandamus* compelling defendant to cause its south-bound fast mail and all its other passenger trains to be run down to its passenger station south of Bridge Junction to stop and take on and leave off passengers. Affirmed by Supreme Court of Illinois. On writ of error to United States Supreme Court reversed.

The Supreme Court held, under all the circumstances, that the requirement was an unconstitutional hindrance and obstruction of interstate commerce. It delayed transportation of through passengers and mails, by turning aside from the direct interstate route and running to a station three miles and a half away, and back again to the same point, when defendant furnished other ample accommodations for Cairo passengers. *Illinois Railway v. Illinois*, 163 U. S. 142.

A statute of Ohio (Rev. Stat., § 3320. Act approved April 13, 1889) provided that "each company shall cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers." The statute provided as a penalty for a violation of the act a forfeiture of not more than \$100 nor less than \$25, to be recovered in an action in the name of the State. Defendant company was sued for a violation of the statute in failing to stop its trains at West Cleveland, a municipal corporation, having more than 3,000 inhabitants on a secular day, and judgment was recovered against it, which was affirmed by the Supreme Court of Ohio. Defendant, by writ of error, came into the United States Supreme Court and claimed that the power to regulate interstate commerce is vested in Congress, and that the Ohio statute, in its application to trains engaged in such commerce, was repugnant to the Federal Constitution and void. The carrier insisted that it had a right to start its trains at any point in one State and pass into and through another State, without taking up or setting down passengers within the limits of the latter State. Defendant was incorporated in Ohio, New York, Pennsylvania, Indiana, Michigan, and Illinois.

The carrier operated each day an express, fast mail, and one other train easterly through West Cleveland, carrying through passengers between New York and Chicago, and four through trains eastwardly through West Cleveland, carrying passengers from Chicago to New York, none of which stopped at West Cleveland. Only one train a day, each way, stopped at West Cleveland. These trains did not carry through passengers. There were thirteen villages in Ohio containing 3,000 inhabit-

ants, through which such trains passed; average time required to stop, three minutes. The court affirmed the judgment and sustained the validity of the Ohio statute. The court, in its opinion, observed in part, that to hold that the Legislature of Ohio had no power in the absence of an act of Congress to pass the statute in question would mean that the carrier could manage its affairs without taking into consideration the interests of the general public, and its directors could so regulate the running of interstate trains as to build up cities and towns at the ends of its lines, or at favored points, and by that means destroy or retard the growth and prosperity of intervening points. It would mean that a State which had granted a charter to a carrier had no power to prevent such carrier from running all its trains through such State without stopping at any city within its limits. The carrier could thus prevent people within such State from engaging in interstate commerce and from using its interstate trains at all or only at such points as the carrier might choose to designate. That the statute of Ohio was in aid of interstate commerce, not hostile to it, and by the statute in question the Legislature did nothing more than regulate the use of a public highway, established and maintained under its authority in such a way as to reasonably promote public convenience. *Lake Shore v. Ohio*, 173 U. S. 285, distinguishing *Hall v. De Cuir*, 95 U. S. 485; *Wabash v. Illinois*, 118 U. S. 556; *Illinois Central v. Illinois*, 163 U. S. 142.

**Stoppage of Sunday Trains.**— A statute of Georgia (Code 1882, § 4578), forbade the running of freight trains on any railroad in the State on Sunday, and declared a violation of the statute to be a misdemeanor. Defendant was indicted and set up the defense that he was operating a freight train engaged in interstate commerce, and that the Georgia statute was a regulation by the State Legislature affecting interstate commerce and was, therefore, unconstitutional and void. Defendant was convicted, his conviction was affirmed by the Supreme Court of Georgia, and on writ of error the United States Supreme Court affirmed the judgment. *Hennington v. Georgia*, 163 U. S. 299.

The court *held*, that had the statute related only to trains transporting domestic freight within the State of Georgia it



could not be regarded otherwise than as an ordinary police regulation, under its authority to protect the health and morals and to promote the welfare of its people. It was not intended as an enactment to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. While in a limited degree the statute may affect interstate commerce it is not necessarily an intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but an ordinary police regulation which the State had power to enact. *Ib.*

**Speed of Trains — When State May Regulate.**— A city, when authorized by the Legislature, may regulate the speed of railway trains within the city limits. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the State at least until Congress shall take action in the matter. *Erb v. Morash*, 177 U. S. 584, citing *Railroad Co. v. Richmond*, 96 U. S. 521; *Cleveland R. Co. v. Illinois*, 177 U. S. 514.

**Express Companies — When not Subject to the Act.**— An express company, independently organized, doing business on its own account and for its own benefit, independent of any connection with the carrier, is not subject to the provisions of the Interstate Commerce Act. To render an express company liable to indictment for a violation of the provisions of the act the indictment must aver that the defendant carries on the express business in connection with the railroad or a combination of railroads as a branch or department of their general freight traffic. In that case the express company would be the mere agent of the carrier, and liable to indictment for a violation of the penal provisions of the act. *United States v. Mossman*, 42 Fed. Rep. 448 (May, 1890, Dist. Ct. East. Dist. Mo.).

**Damages for Unreasonable Charges.**— The act declares that all charges by the carrier must be reasonable and just, and every unreasonable and unjust charge is declared to be unlawful. A shipper who suffers damage by reason of an unlawful charge has a cause of action under section 1. Such an action is not based

on the facts which give a cause of action for unjust and unreasonable discrimination under section 2, where one shipper is charged more than another for a like service. *Kinnary v. Terminal Railroad Assoc.*, 81 Fed. Rep. 802 (June, 1897, Cir. Ct. East. Dist., Mo. E. D.) ; *Van Patten v. Chicago Railroad*, 81 Fed. Rep. 545 (June, 1897, Cir. Ct. No. Dist. Iowa).

In an action under section 1 for damages for an unlawful charge the published rate is *prima facie* evidence as a standard of comparison whether or not the charge complained of is unreasonable. The complaint in such an action must allege either that no schedule of rates was published by defendant, or that the rate charged plaintiff was in excess of such published rate. The published rate is the only legal rate the carrier can charge, and any violation of them subjects the carrier to the penalties of the act. A compliance with the published rate is defense to such an action. *Ib.*

See also as to published rates *Railway Co. v. Hefley*, 158 U. S. 158.

**“Common Control.”**— Where carriers agree upon a schedule of joint rates, which are published pursuant to the provisions of the Interstate Commerce Act, in which each of the defendants participates, and they agree among themselves as to their *pro rata* share of such rates, the transaction constitutes “a common control, management, or arrangement for a continuous carriage or shipment” within the meaning of the act, and each participant became thereby subject to the provisions of the act. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

**Successors in Interest Bound by Order.**— An order made by the Interstate Commission directing a corporation carrier to cease from giving drawbacks, rebates, or unjust charges discriminating against a shipper, cannot be defeated by the dissolution or re-organization of the corporation. The corporations succeeding to the interests of the original corporation and taking over its assets, property, and franchises will be bound by the order made against the predecessor in like manner as if the order had been made against its successors. *Interstate Com. Co. v. West-*

*ern Railroad*, 82. Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

**Receiver Bound by Order against Corporation.**—An order made by the Interstate Commerce Commission with regard to rates is binding upon the successors of the corporation and upon the receiver of such a corporation appointed by the court. If the order of the Commission was void for want of power, (an order fixing rates which the Commission cannot make) a receiver of the corporation thereafter appointed is not bound to obey it. Nor can the court grant relief under such an order upon the theory that the petition seeking relief against a receiver is practically an application to the court to regulate the conduct of the receiver as an officer of the court. Such an order cannot be enforced on the ground that it concerns only the petitioners and the receiver who practically represents the court. *Ib.*

**Receivers and Trustees Liable.**—Congress by the Elkins Act, approved February 19, 1903, has expressly extended the liabilities and penalties of corporations for violations of the Interstate Commerce Act to directors and officers of the corporation, and also to any receiver, trustee, lessee, agent, or person acting for or employed by such corporation. Such persons are declared to be criminally liable under the statute for acts done by them in violation of its provisions, and such acts are declared to be the acts of the corporation.

**Reasonableness of Rates a Judicial Question.**—Whether rates of transportation fixed by the carrier are reasonable or not is a judicial question, to be determined upon evidence as to all surrounding facts and circumstances in each case. A statute of Minnesota (approved March 10, 1887, chap. 10) which the Supreme Court of Minnesota held made the rates fixed and published by the Railroad Commission of the State final and conclusive, and not open to judicial inquiry, is in conflict with the constitutional provision which forbids the taking of property without "due process of law." *Chicago Railroad v. Minnesota*, 134 U. S. 418.

The court below granted a writ of *mandamus* to compel the carrier to enforce the rates within the State fixed by the Commission.



In response to the petition for the writ the carrier claimed that the rates fixed by the Commission were unreasonable, and the State court held that the statute fixed the rates, and evidence by the carrier as to whether they were or were not reasonable was immaterial. *Held* error. That the construction of the State court given to the Minnesota statute that the rates fixed under it were final and conclusive operated to deprive the carrier of his property without due process of law, and denied to it the equal protection of the law. *Ib.*

**Reasonable Rates — The Element of Risk and Value.**— In passing upon the question as to whether rates are reasonable the Interstate Commerce Commission must take into consideration the value of the service and the element of remuneration to the carrier for the additional risk he takes on expensive merchandise as distinguished from cheap goods. If it appears that the Commission took no evidence or did not consider these elements in making its order the court will refuse to enforce it. *Interstate Com. Co. v. Delaware Railroad*, 64 Fed. Rep. 723 (December, 1894, Cir. Ct. No. Dist. N. Y.).

**Duty of Carrier—Boycott—Strike Will not Excuse Carrier.**— A common carrier in the performance of his duties as such is not excused for failure to discharge them by reason of the fact that a strike has been instituted by employees of a carrier who threaten to boycott any carrier handling cars or facilities of the company on whose road the strike is in progress. *Chicago Railroad v. Burlington Railroad*, 34 Fed. Rep. 481 (March, 1888, Cir. Ct. So. Dist. Iowa).

The duty imposed upon a carrier of interstate commerce will be enforced by a mandatory injunction where the injury resulting from its non-performance is continuing. The plea that if defendant should receive cars from the "boycotted" road its own men would be called out and a strike inaugurated will not excuse compliance with the order of the court. *Ib.*

See also *Beers v. Wabash*, 34 Fed. Rep. 244 (March, 1888, Cir. Ct. No. Dist. Ill.).

**§ 2. Unjust Discrimination Defined.**— That if any common carrier subject to the provisions of this act shall,

directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

**Object and Scope of Section 2.**— The apparent object of section 2, known as the Anti-rebate Law, was to protect the shipper from being discriminated against by the carrier by forbidding inequality in charges. The primary object of the act is to place all shippers upon an equality. Experience has shown that a carrier, in order to secure business from a rival and divert traffic from a competitor, has influenced large shippers to patronize it, and by way of inducement to offer the shipper substantial advantages by a secret arrangement whereby it carries the goods at less than the published schedule rate. This is frequently accomplished by giving secret rebates and drawbacks which enable the shipper to undersell rivals and competitors and to increase his business to an extent which may, in some instances, ruin competitors.

There have been instances in which the carrier was secretly interested in the business of the shipper. Often carriers of coal are also engaged in mining coal. Officers of the carrying corporation are also officers of the mining corporation. The carrier is also the miner, the mining corporation shipping coal over the road operated by some of its own members as officers of the carrying corporation. The temptation of such shippers to favor themselves at the expense of their rivals is obvious. The carrying company secretly gives rebates and drawbacks

to the mining company shipping coal to the market in which its officers are interested. These advantages in freight rates give the favored shipper an unjust and unfair advantage which enables him to destroy competition and secure a complete monopoly.

These particular evils are sought to be remedied by section 2. The secret rebates, drawbacks, or other devices whereby one shipper is charged less for the same service than another are designated unjust discrimination, which is prohibited and declared to be unlawful. The appropriate remedy under section 2 is an action at law by the shipper to recover the money unjustly exacted and paid by him to the carrier in excess of what was charged or paid by other shippers or competitors for like services under substantially similar circumstances and conditions. The liability for moneys received by the carrier in violation of section 2 is declared by section 8, and the remedy by section 9. It may be recovered by the shipper in an action at law as damages. The shipper may, under section 9, elect to proceed before the Interstate Commerce Commission, but in that case the remedy would not be for money damages, but would be a preventive remedy by a restraining order to be enforced by injunction at the suit of the Commission in a Circuit Court of the United States. Section 10 also creates a criminal liability for a violation of the provisions of the act. But the shipper must elect either to sue at law for damages or proceed before the Commission to secure an injunction. He cannot avail himself of both remedies.

The "discrimination" referred to in section 2 should not be confounded with the discrimination defined in section 4, which relates only to charges whereby the shipper is obliged to pay a greater sum for a short than for a long haul under substantially similar circumstances and conditions.

**Similar Provisions Under English Tariff Act.**— The English Tariff Act, which formed the basis of the Interstate Commerce Act, contains similar provisions to those contained in section 2. The English courts in construing the British statute have uniformly condemned unjust discrimination of the sort referred



to in section 2. Their courts have observed that it might well be that a carrier, in order to increase its business, might induce a shipper to divert part of his custom from a rival road and give the business to the soliciting carrier, and as an inducement might agree to give the shipper substantial concessions in rates. Such discrimination in favor of large or favored shippers might be profitable to the carrier. Such profit, however, would be wholly at the expense of a rival carrier. But it has been uniformly held that preferences given to particular shippers to induce them not to divert traffic from the carrier, or to induce them to transfer traffic to one carrier which otherwise would go to another, are unlawful and cannot be justified on the ground of profit to the carrier allowing them. *Harris v. Cockermouth Railroad*, 3 C. B. (N. S.) 693; *Evershed v. London Railroad*, Law Rep., 2 Q. B. Div. 254.

The *Harris case*, cited above, was decided in January, 1858; the *Evershed case* in February, 1877. The English statutes referred to were the Consolidation Act of 1845 (8 & 9 Vic., chap. 20) and the Railway and Canal Traffic Act of 1854 (17 & 18 Vic., chap. 31). The undue preference clause of the latter act (§ 2) is as follows:

“Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

**Unjust Discrimination under the Elkins Act.**—The principal aim of the act of February 19, 1903, known as the Elkins Act, *post*, pages 133–138, is to amplify the provisions of section 6, to secure greater publicity in publication of rates and tariffs. The act relates also to rebates, concessions, and discrimination with respect to the transportation of property. In this respect the

Elkins Act amplifies the provisions of section 2. It declares that "it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier \* \* \* whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariff published and filed by such carrier, \* \* \* or whereby any other advantage is given or discrimination is practised." The acts of any officer, agent, or other person acting for or employed by the carrier shall be deemed to be the act of the carrier corporation, as well as the act of the agent or employee. A departure from the published rate, "or any offer to depart therefrom," constitutes an offense under the statute. The published rate is conclusive evidence of the legal rate. The rates bind the carrier publishing them, or any carrier "who participates" in the rate so filed and published. See *post*, page 135.

**Parties — Those Receiving Rebates.**—The Elkins Act of February 19, 1903, contains a new and important provision as to suits and complaints with respect to rebates. Prior to the passage of the Elkins Act the proper party defendant was the carrier alone who gave the rebate, and afforded the shipper an undue preference and advantage by carrying his goods for a less rate than it charged competitors in the same business. Section 2 of the Elkins Act declares that in actions or suits in the Federal court, or in proceedings before the Interstate Commerce Commission, "it shall be lawful to include as parties, in addition to the carrier, *all persons* interested in or affected by the rate, regulation, or practice under consideration."

It will be observed that under this section the carrier giving the rebate and the shipper who receives it may both be brought before the court or Commission, and all orders, judgments, and decrees "may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

**Suit for Excessive Charges Existed at Common Law.**—The adoption of the Constitution of the United States did not abro-

gate the common law previously existing, and carriers engaged in interstate commerce prior to the passage of the Interstate Commerce Act remained liable to the shipper as at common law, and this liability could be enforced in the State courts prior to the passage of that act. If the plaintiff and defendant were citizens and inhabitants of different States such an action could be maintained in a Circuit Court of the United States. In an action by a shipper for damages for excessive charges on interstate shipments before the adoption of the Commerce Act, the carrier's liability was governed by the common law, and since its adoption the shipper's liability is governed by the common law as modified by the act. *Murray v. Chicago Railroad*, 62 Fed. Rep. 24 (June, 1894, Cir. Ct. No. Dist. Iowa, C. R. D.) ; affirmed, 92 Fed. Rep. 868 (C. C. A. 8th Circuit, February, 1899), 35 C. C. A. 62.

Before the passage of the act a shipper, a citizen of Ohio, sued the carrier, a citizen of Pennsylvania, in the United States Circuit Court, Northern District of Ohio, for damages for charging plaintiff more than defendant charged another shipper for a like service, alleging defendant's liability under the common law. The action was sustained and plaintiff had a verdict. *Hays v. Pennsylvania Railroad*, 12 Fed. Rep. 309 (June, 1882, Cir. Ct. No. Dist. Ohio).

**Suits for Excessive Charges under State Statutes.**— The evil sought to be remedied by section 2 of the Interstate Commerce Act became so frequent throughout the country before Congress passed the act that a number of the States passed statutes containing provisions similar to those contained in section 2. In many cases the State statutes created a liability against the carrier for treble damages which the shipper was authorized to recover in an action at law. The State of Colorado, among others, passed such an act in 1885. (Laws 1885, chap. 309.) Suit was brought in the Federal court against the Union Pacific railroad for a violation of the statute on shipments of coal. The defense was an alleged contract whereby defendant claimed it was obliged to give the favored shipper and competitor of plaintiff a lower freight rate in case it furnished defendant each year 2,000 tons of coal for transportation, but it was not alleged



that the favored shipper furnished this amount of coal annually, but defendant gave it the rebate. Defendant also pleaded as an excuse for giving the rebate what was alleged to be a claim in tort against the favored shipper for an unliquidated amount. These defenses were overruled, and plaintiff had judgment which was affirmed by the Supreme Court. *Union Pacific v. Goodridge*, 149 U. S. 680.

In sustaining the judgment and affirming the validity of the Colorado statute, Judge BROWN took occasion to observe that it was intended thereby "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power not in the railroad company itself, but in the railroad commissioner to except special cases designated to promote the development of the resources of the State." *Ib.*

**Common-Law Remedy not Superseded by Statute.**—The remedy of the shipper against the carrier to recover damages for unreasonable and extortionate charges at common law remains until the Legislature or Congress sees fit to enact a statutory remedy. In such case the statutory remedy supersedes the common-law remedy, unless the statute expressly declares such remedy to be cumulative and not exclusive. *Windsor Coal Co. v. Chicago Railroad*, 52 Fed. Rep. 716 (November, 1892, Cir. Ct. West. Dist. Mo.).

The Interstate Commerce Act, however, expressly declares (section 22) that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies." The remedies afforded by the Federal statute, therefore, are cumulative and not exclusive. See *post*, pages 232, 233.

Since the passage of the Interstate Commerce Act all State legislation is thereby superseded as to interstate shipments only. The State statutes remain in full force and virtue in so far as they relate to shipments within the borders of the State. As to such shipments they may be enforced in the State courts, or in the Federal court in case of diversity of citizenship. An action for damages under the Interstate Commerce Act relating

solely to interstate shipments must be brought in the Federal court which has exclusive jurisdiction. See *post*, page 156.

**Rebates — Liability of Successor of Corporation.**— A successor of a carrying corporation is bound by an order or decree against the original corporation in the same manner and to the same extent as was the original corporation. A lawful order of the Interstate Commerce Commission directing a railroad corporation to cease and desist from giving unjust preferences, rebates, or drawbacks, cannot be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. *Interstate Com. Co. v. Western Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

**Criminal Liability — Form of Indictment.**— In addition to the civil liability created by the act, a violation of its provisions is made by section 10 of the act a misdemeanor. The penalty prior to the act of February 19, 1903, was by fine or imprisonment or both. The latter act increased the amount of the fine and abolished the provision prescribing imprisonment.

An indictment against a receiver of a railroad for violating the provisions of section 2, after setting forth details of time, place, distance, amount, and kind of freight transported for one shipper, and alleging that the charge to that shipper was for a lower rate than was charged one Henry "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" is sufficient. *United States v. De Coursey*, 82 Fed. Rep. 302 (August, 1897, Dist. Ct. No. Dist. N. Y.).

An indictment which charges defendants with receiving certain rates from a shipper at specified times, and that at such times they unlawfully and willfully paid such shipper a certain rebate, is sufficient. *United States v. Morris*, 71 Fed. Rep. 672 (January, 1896, Dist. Ct. No. Dist. Ill.); *United States v. Morris*, 71 Fed. Rep. 672; *United States v. Jenkins*, 71 Fed. Rep. 672.

A railroad company was found guilty of unjust discrimination in violation of section 2 of the act on shipments of oil from Titusville and Oil City, Pa., to New York and points in other States, and was ordered to cease and desist from

continuing such unjust discrimination. Pending proceedings to enforce the order, the company was re-organized and the Western New York and Erie railroads succeeded to its rights, property, and franchises. *Held*, that the successors of the original corporation were bound by the order on the familiar principle that the purchaser of property in litigation *pendente lite* takes it *cum onere*, and is bound by any judgment, order, or decree in the suit. *Ib.*

**Rebates — Terminal Charges — Cartage.**— As a rule, cartage is not a terminal charge or expense, and is not usually assumed by the carrier. Where a carrier furnished free cartage to shippers in one locality and refused to furnish free cartage to shippers in another less distant locality on its line, the cartage will not be regarded as part of the charge of transportation within the meaning of the Interstate Commerce Act, unless the Commission should promulgate an order that carriers should regard cartage when furnished free as a terminal charge, and include it as such in their published schedules. *Interstate Com. Co. v. Detroit Railroad*, 167 U. S. 633.

The purpose of section 2 of the Interstate Commerce Act is to enforce equality between shippers, and it forbids any rebate or other device by which two shippers, over the same line, the same distance under the same circumstances of carriage, are compelled to pay a different price therefor. A carrier operating a competing line, to secure the business of a shipper shipping beer from Cincinnati to Pittsburg, gave the latter a rebate of three and one-half cents per hundred for cartage in hauling the beer from its depot to the shipper's brewery, and gave no such rebate to other shippers who shipped beer from Cincinnati to Pittsburg, is guilty of a misdemeanor under section 2 of the act. *Wight v. United States*, (May, 1897) 167 U. S. 512.

The favored shipper's brewery was on a siding of a competing line known as the "Panhandle" and when taken on the "Panhandle" it was hauled over the siding directly to the brewery without the added expense of cartage. *Held*, that that fact constituted no defense to the charge. The tariff charged by both lines from Cincinnati to Pittsburg was fifteen cents per hundred. Defendant charged all shippers this rate for such service, but it



allowed the favored shipper, whose brewery was on the siding of the "Panhandle," to haul the beer from defendant's depot to his brewery. This cartage cost the shipper three and one-half cents per hundred, and this cost was refunded to him by the carrier. The court held that the net result was that to this particular shipper the charge was eleven and one-half cents per hundred, while the charge to other shippers whose breweries were not upon a railroad siding was fifteen cents per hundred for the same service "under substantially similar circumstances and conditions." *Ib.*

**Remedy by Injunction — Elkins Act of February 19, 1903.—**

The violation of the provisions of section 2 creates not only a civil and criminal liability, but the acts thereby forbidden may also be corrected in equity by injunction under the supplemental statute of February 19, 1903. Under that act a proceeding may be instituted on behalf of the United States as party plaintiff on motion of the Attorney-General, or at the request of the Interstate Commerce Commission the government may invoke the remedies provided by the act with regard to unlawful discrimination, rebates, or concessions in respect to the transportation of property in interstate or foreign commerce, in a Circuit Court of the United States. Such court may issue a mandatory writ or order to enforce the provisions of the act. Such remedy is expressly declared cumulative, and shall not preclude "the bringing of suit for the recovery of damages by any party injured." The Federal court sitting in equity shall summarily proceed to inquire into the circumstances upon such notice, and in such manner as the court shall direct, and without the formality of pleadings and proceedings applicable to ordinary suits in equity. These provisions of the statute create new remedies, retroactive in their operation, and are applicable, as far as practicable, to pending and undetermined proceedings brought prior to the passage of the amending act, which is declared to be a remedial statute. *Missouri Pacific Railroad v. United States*, 189 U. S. 274; *United States v. Michigan Railroad*, 122 Fed. Rep. 544 (April, 1903, Cir. Ct. U. S. Dist. Ill.).

While the *Missouri Pacific* case was pending in the Supreme Court of the United States, and before the controlling decision

therein had been announced, a similar bill was filed in behalf of the United States under the Elkins Act of February 19, 1903, for an injunction to restrain defendants, the Michigan railroad, from enforcing rates claimed to discriminate among shippers in violation of section 2 of the Interstate Commerce Act. On demurrer defendants contended that the proper remedy was an action for damages by the shipper, and that the Federal court had no jurisdiction in equity to issue an injunction, as the proper remedy was an action at law. The court overruled the demurrer. Actions at law by the shipper are proper, but in many instances are wholly inadequate. *United States v. Michigan Central*, 122 Fed. Rep. 544 (April, 1903, Cir. Ct. No. Dist. Ill.).

In the case cited, the bill averred that defendant practiced unjust discrimination among shippers of grain and packing-house goods, and that this discrimination was carried on to such an extent that each carrier reaching the grain district had eliminated all competitive dealers, leaving only a single favored dealer who purchased all the grain at all stations along the carrier's line. The conditions complained of deprived the growers of grain of the benefit of competition among dealers. Practically the carrier established its own agencies for the purchase of grain, and by devices and discriminations had excluded all other grain purchasers from the field. For such stupendous wrongs an action by the individual shipper is inadequate. The Interstate Commerce Act confers on every citizen engaged in productive industry, the right to have his product transported on equal terms with his competitor. This right is a property right, and effects directly an interest in property. "Nothing short of the prohibitive arm of a Court of Chancery," says Judge GROSSCUP, "can give to the grain growers and producers the free competitive field for the sale of their products to which they are entitled as matter of right under the Interstate Commerce Act." *Ib.*

**Pleading — Anti-rebate Suits — Complaint.**— In an action by a shipper against a carrier for unjust discrimination in violation of section 2, the complaint or declaration must state facts which show the circumstances and conditions under which

defendant charged plaintiff a given rate for transportation of freight. He may then allege in the language of the act that for like services under substantially similar circumstances and conditions, defendant had given another shipper a less rate, without setting forth the facts which show that the services were alike or rendered under substantially similar circumstances and conditions. *Kinnavey v. Terminal R. Assoc.*, 81 Fed. Rep. 802 (June, 1897, Cir. Ct. East. Dist. Mo.).

The complaint alleged in substance that defendant, at periods stated, exacted from plaintiff an unreasonable and unjust charge for carrying coal from East St. Louis, Ill., to St. Louis, Mo., and that during same period defendant performed like services for Consolidated Coal Co., a competitor in the transportation of coal under substantially similar circumstances and conditions, and charged and collected from the competitor a less sum therefor than it exacted from plaintiff. Defendant demurred. The court overruled the demurrer. "The pleader" said the court, "alleges the ultimate facts which constitute the right of recovery, and has alleged them in the language of the act which confers the right of action. He has declared that defendant rendered the Consolidated Coal Company for twenty-five cents a ton services like those rendered to him for which it charged thirty cents per ton, and that these services so rendered to the Consolidated Coal Company were performed under circumstances and conditions substantially similar to those attending the services rendered to the plaintiff." The details of these circumstances need not be set forth. They are matters of proof. Nor is it necessary to allege that plaintiff was charged more than the schedule rate to show damage. Plaintiff is entitled to the damage he sustained by reason of the discrimination. *Ib.*

See also authorities cited under sections 8 and 9, *post*, pages 146, 152.

**Damages for Unlawful Charges under Section 1.**—A shipper who is charged in excess of the published rate, or is charged an unreasonable or unjust rate has a cause of action for damages, under section 1, which declares unjust and unreasonable rates to be unlawful. Such a cause of action must be distinguished from a cause of action for unjust discrimination under



section 2. *Kinnavey v. Terminal R. Assoc.*, 81 Fed. Rep. 802 (June, 1897, Cir. Ct. East. Dist. Mo.).

See also *Van Patten v. Chicago Railroad*, 81 Fed. Rep. 545 (June, 1897, Cir. Ct. No. Dist. Iowa).

**Discrimination — Forwarders — Mixed Carload Rates.**— The carrier fixed a charge for freight shipped in carload lots. For all shipments where the freight was less than a full carload a rate was charged greater in proportion than the rate on full carloads. The margin between the rates was substantial, and certain persons engaged in the business of soliciting and forwarding freight in small lots. The method was to combine such shipments so as to make full carloads. The freight thus forwarded in one car belonged to several shippers who received the benefit of carload rates. The carrier, in order to break up this forwarding business, promulgated a rule which declared that the rule as to carload rates shall apply only to rates from one shipper and will not cover less than carload shipments from two or more shippers combined into carloads by forwarding agents claiming to act as shippers. The words "forwarding agents" shall be construed to mean agents of the carrier and of the actual shipper, or persons interested in the combination shipments into carloads at the point of origin. *Lundquist v. Grand Trunk Railroad*, 121 Fed. Rep. 915 (July, 1901, Cir. Ct. No. Dist. Ill.).

The forwarding agents filed a bill alleging that defendants were guilty of unjust discrimination against complainants in violation of section 2 of the Interstate Commerce Act in favor of carload shipments by the owner of all the goods contained in a carload. That the latter received transportation for less than was charged to complainants, who also forwarded carload shipments to points between Chicago and New York. That complainants would suffer irreparable loss and injury, and their business would be broken up and destroyed unless the relief sought was granted. *Ib.*

The court denied the injunction on the ground that upon the pleadings and evidence it seemed clear that the service demanded by complainants, all the circumstances and conditions considered, was not a like and contemporaneous service of a like kind

of traffic under similar circumstances and conditions to those offered by defendants to owners of goods, as distinguished from forwarding agents representing several owners. Under the circumstances, and in view of the liability incurred by the carrier to the various owners, the court held that the rule adopted by defendants as to less than carload rates was not unreasonable.

The court (KOHLSAAT, J.), observed that the issues presented a pioneer case, and the court could derive little aid from authoritative sources, but upon the facts presented the court was clearly of opinion that the contentions of complainants could not be sustained. *Ib.*

**§ 3. Unreasonable Preference or Advantage.**—That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

**Duty to Connecting Lines.**— Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

**Object and Scope of Section 3.**— Section 2 was intended to protect the shipper who had been compelled to pay more to the carrier than another shipper was compelled to pay for a similar service. The carrier can favor one shipper at the expense of another. It can, in like manner, favor one locality at the expense of another. An individual shipper may be able to secure secretly from the carrier a lower rate than is paid by his rival for the same service. The carrier may also, from self-interest or other motive, favor a particular locality by making a lower rate to a particular point than is given to another point located, it may be, at a greater distance on the carrier's line. The merchants in the favored locality would thus be enabled to undersell their neighbors doing business in the locality discriminated against.

Carriers may also discriminate among themselves. They may furnish rates and facilities to one carrier which they deny to a competitor. They may discriminate not only in rates and charges, but also in the use of facilities for interchange of traffic.

The apparent object of section 3 was to protect a locality or community from being discriminated against, and also to protect a carrier from similar injustice, not only in the making of joint or through rates with competing lines, but in securing equal facilities over connecting lines.

The protection afforded by section 2 relates solely to moneys exacted unjustly from the individual shipper in excess of moneys received from another shipper for a like service. The protection afforded by section 3 relates to any unjust advantage or preference given to an individual, or to a locality, or with regard to any particular description of traffic, or to any unjust discrimination by one carrier against another carrier as to rates, charges, or facilities in operating connecting lines, or in making joint rates over connecting lines.

The appropriate remedy under section 2 is an action at law by the shipper to recover money damages. The government of the United States may now, under the Elkins Act of February 19, 1903, procure an injunction to restrain violations of section 2. The appropriate remedy under section 3 would seem to be in equity by injunction, or in case of discrimination among



carriers by writ of *mandamus* to compel the offending carrier to forward the freight. A shipper or carrier injured by a violation of section 3 may, under certain circumstances, seek his remedy at law for damages. But in the majority of cases the remedy for the grievances for a violation of section 3 is by way of injunctive relief.

**Discrimination against a Locality — Remedy by Injunction.**

-- Section 3 forbids the carrier to discriminate or give an unreasonable preference or advantage to a particular locality. A carrier sought to build up a seaport on its own line (Pensacola) at the expense of another port (Savannah) on a rival line. It may be conceded that this may be done to a reasonable extent. A carrier may so adjust its rates as to promote its legitimate interests. But it cannot for the purpose of building up a rival seaport on its own line adopt rates excessive in themselves unduly preferential to its own port (Pensacola) and unduly prejudicial to another port (Savannah). The rate on naval stores made by defendants between Pensacola and Savannah was found to be not only excessive but prohibitory. The action of defendants resulted not only in giving Pensacola an inferior market, a monopoly, but gave the entire control of that market to one dealer in naval stores. The court enforced by injunction the order of the Commission forbidding the rates complained of, on the ground that they were in themselves unlawful, in violation of section 1, and discriminated against a locality in violation of section 3. *Interstate Com. Co. v. Louisville*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

The Savannah Bureau of Freight and Transportation and nine other complainants in Florida on the line of the Pensacola and Atlantic division of the Louisville & Nashville complained to the Commission that the joint-tariff rates made by defendants on shipments now moving easterly from stations on said division from Pensacola to Savannah were *per se* unreasonable, and that they were relatively unjust and unreasonable when compared with the rates charged by defendants from the same stations moving westerly to Pensacola, Mobile, and New Orleans, and resulted not only in unjust discrimination against complainants, but gave an undue and unreasonable advantage to

the localities of Pensacola, Mobile, and New Orleans to the disadvantage and prejudice of Savannah and localities on said division between Savannah and Pensacola. It was alleged that defendant's object was to divert traffic from Savannah and deflect it to New Orleans by preventing the movement of cotton eastward from Pensacola to Savannah and intermediate stations, and cause it to move in the opposite direction toward New Orleans. With this end in view defendants advanced the rate on cotton shipped from Pensacola to Savannah from \$2.75 to \$3.30 per bale (this advance was made while the case was pending before the Commission). The rate from Pensacola to New Orleans was \$2.50 per bale. When the investigation was begun the New Orleans rate was \$2.50 per bale, and the Savannah rate was \$2.75 per bale, a difference of twenty-five cents in favor of New Orleans and Mobile. When the suit was instituted to enforce the order of the Commission, the New Orleans rate was \$2.50 and the Savannah rate was \$3.30, a difference of eighty cents in favor of New Orleans. There was no change of conditions, and the sole reason assigned for the higher rate was to increase the revenues of defendants. The average distances were as follows: From Pensacola to Savannah, 339½ miles; to New Orleans, 326 miles. Average distance to Savannah, 13½ miles greater than to New Orleans, yet the Savannah rate exceeded the New Orleans rate eighty cents per bale. *Held*, that defendants were not justified in making the Savannah rates. That they were unlawful in violation of section 1, and prejudicial against the localities of Savannah and intermediate stations between Savannah and Pensacola in violation of section 3. *Ib.*

Discriminations or preferences in rates may be justified to safeguard the interests of the public. The counter-proposition is true that they cannot be justified when they injure the interests of the public. *Ib.*

See also *Tift v. Southern Railroad*, 123 Fed. Rep. (July, 1903, Cir. Ct. So. Dist. Ga.).

A shipper in Portland, Ore., filed a bill for an injunction under the Interstate Commerce Act, charging the carrier with fixing rates which gave an undue preference in favor of San Francisco and its merchants over Portland and its mer-

chants, and alleging that the rates charged from Portland were unjust and unreasonable. The court dismissed the bill on the ground that it was not alleged that the rates from Portland were not unjust and unreasonable in themselves, could not become so by comparison with other joint rates from an opposite direction, and from a different and competing point on the road of a different carrier who was not a party to the suit. *Allen & Lewis v. Oregon Railroad*, 98 Fed. Rep. 16.

**Discrimination against Carrier — Remedy at Law.**— Plaintiff, a carrier by water, sued defendant railroad at law for damages, alleging unjust discrimination by defendant against plaintiff in charging plaintiff \$1.25 per bale for transporting cotton from Mobile to New Orleans, while for the same service defendant charged other shippers and the general public eighty cents per bale, which was known as "the Mobile rate." Defendant in its answer claimed dissimilarity of circumstances and conditions, in that plaintiff was a carrier and transported its goods from Demopolis, Ala., to Mobile, for the purpose of re-shipping it from Mobile to New Orleans. That defendant had an agreement with the Louisville and Nashville and other carriers to make the rate from Demopolis to New Orleans \$1.25 per bale, and that as plaintiff brought its cotton by water from Demopolis to Mobile for re-shipment at that point defendant was bound to charge it the rate from Demopolis to New Orleans instead of the rate from Mobile. It appeared that plaintiff had no railroad from Demopolis to Mobile, but carried its goods between those points in packet-boats.

Plaintiff demurred to the answer, and the court sustained the demurrer, holding that defendant was not justified in charging plaintiff more to ship its goods from Mobile to New Orleans than it charged other shippers or carriers. That defendant, by refusing to ship for plaintiff at that rate, discriminated against plaintiff unlawfully, and that the conditions of dissimilarity created by defendant's consent or connivance was not a defense to the action. *Bigbee Packet Co. v. Mobile Railroad*, 60 Fed. Rep. 545 (December 30, 1893, Cir. Ct. So. Dist. Ala.).

See also *Cutting v. Florida Railway & Navigation Co.*, 30 Fed. Rep. 663 (April, 1887, Cir. Ct. No. Dist. Fla.).



**“Facilities” Defined.**— The word “facilities” in section 3, requiring carriers to furnish connecting lines with “equal facilities” has been held to include a through bill of lading. “The through bill of lading,” says SPEER, J., “is a facility, but is not a necessity for interchange of freight.” Se held in a proceeding to compel a carrier by *mandamus* to furnish facilities to competing carriers over its line on equal terms. *Augusta Southern v. Wrightsville Railroad*, 74 Fed. Rep. 522 (April, 1896, Cir. Ct. So. Dist. Ga. PARDEE, Circuit Judge, and SPEER, District Judge).

The case cited above contains the only judicial construction thus far of the word “facilities” or “equal facilities” as contained in section 3 of the Commerce Act. The court holds that interchange of freight is facilitated by the use of a bill of lading. In other words, that a bill of lading, as a convenient instrumentality for transportation of property, is a “facility” for interchange of traffic within the meaning of the statute. The technical meaning of the word upon standard authority fully supports this construction. The word “facility,” usually used in the plural, is thus defined in the Standard Dictionary: “Something by which anything is made easier or less difficult; an aid, advantage, or convenience.”

**Facilities — Switches and Sidings.**— The words “equal facilities,” or “facilities,” as used in the act, and as defined by lexicographers, is broad enough to include within its meaning sidings and switches. See *Interstate Stockyards* case, *infra*. This conclusion is especially justified in connection with the words “railroad” and “transportation,” as defined in section 1 of the statute. A railroad, the act declares, shall include not only bridges and ferries, but all the road *in use* by any corporation operating a railroad, whether owned or operated under a contract, *agreement*, or lease. The term “transportation” shall include “*all instrumentalities* of shipment or carriage.” It seems clear that a switch or a siding, constructed with or without an agreement with the shipper is an instrumentality of shipment. That is the only use to which a siding and siding switch is put. A siding or switch connection is a means by which loading merchandise for shipment “is made easier or less difficult.” It is certainly “an

aid, advantage, or convenience." This is clearly demonstrated in the case of shippers of coal. Sidings equipped with tipples and screens is practically the only method in use by which coal can be quickly and conveniently loaded upon cars for transportation. See *Harp* case, 125 Fed. Rep. 445, and other authorities, *infra*, and authorities under section 23 of the Commerce Act, *post*, page 327.

**Facilities to Shipper — Switches, Sidings.**— By the express terms of the Interstate Commerce Act there can be no lawful discrimination to the advantage or disadvantage of any person, place, locality, or kind of traffic. A common carrier of interstate freight cannot lawfully deny switch connections and service to one person, place, locality, or kind of traffic which it affords to others similarly situated. Defendant's counsel contended that certain switch connections were made simply for the purpose of delivering and receiving dead freight thereat and therefrom. The court held that the existence of switch connections rightfully existing implies the right of the owner thereof to service thereat by the carrier consenting to such connections. It would be a vain and foolish thing to incur the labor and expense of making such connections unless they were to be used in connection with the transportation of freight to and from the same. And, unless the right to service at such switch connections is limited, either expressly or impliedly, the owner thereof may lawfully insist that the carrier shall there deliver and receive all such freight as it customarily carries if the switch connections are suitable and convenient for the delivery and receipt of such freight. The carrier could not lawfully limit the right to use such switch connections for any kind of interstate freight transported by it when the switches were authorized by ordinance and statute, which contained no provision limiting their use. The ordinance and statute (Laws Indiana, 1885, approved March 2d) requires switch connections to be granted to all persons, and service in respect to all freight to be afforded upon equal rights and impartial terms. Nothing short of the clearest and most unambiguous language would justify the court in holding that it was the purpose of either the State or city to create a perpetual monopoly. *Interstate Stockyards v. Indianapolis Railway* (Cir. Ct. Dist., Ind., January, 1900), 99 Fed. Rep. 472.

**Facilities to Shipper — Stockyards.**— A common carrier of live stock, engaged in interstate commerce, has no right to discriminate as to stockyards affording facilities for feeding, watering, and resting stock. The Federal Live Stock Law and the Live Stock Law of Indiana, which is identical, imposes a duty upon the owner of the stock in the first instance. The carrier can act only when the owner neglects or refuses to comply with the provisions of the statute. *Interstate Stockyards v. Indianapolis Railway*, 99 Fed. Rep. 472.

**Facilities to Shipper — When Contract for Void.**— Defendant company made a contract with plaintiff whereby it agreed to furnish him cars and transport his lumber from Rankin, Ark., into the State of Texas, upon terms and conditions set forth in the contract. Plaintiff claimed that this contract had been violated by the carrier and sued upon it in the State court for damages for the breach. Defendant set up the defense that the contract was void, as it created a discrimination in favor of plaintiff and was in violation of the Interstate Commerce Act. The defense was sustained and the complaint dismissed, and the judgment of dismissal was affirmed by the Supreme Court of Arkansas. Upon writ of error to the United States Supreme Court *held*, that the latter court had no jurisdiction to review the judgment. The fact that a Federal statute has been construed unfavorably against one party gives the United States Supreme Court no jurisdiction, unless such construction was not only unfavorable but was against the right of a party to the suit. *Kizer v. Texarkana R. Co.*, 179 U. S. 199.

**Facilities to Shipper — Reasonable Regulations.**— The carrier is bound to treat all shippers impartially, charging each the same rate for substantially the same service and affording to each the same facilities for shipment. The carrier, however, has a right to establish reasonable rules and regulations governing the mode of shipment to enable it to handle and transport traffic conveniently, safely, and expeditiously. It may also, if circumstances require, revoke such regulations and substitute others. *Harp v. Choctaw Railroad*, 125 Fed. Rep. 445.

A carrier was sued for damages for unjust discrimination claimed to have been sustained by plaintiff. The evidence



showed that defendant had allowed shippers to load coal from wagons into cars upon its house track. The court held that defendant was not bound to continue to do so and was not liable in damages nor guilty of a legal wrong by discontinuing the practice, when it appeared that a continuance of it would result in loss and injury to the carrier, and that such revocation affected all shippers equally. *Ib.*

**Facilities — Spur Tracks.**— In the *Harp* case above cited it appeared that a carrier operating a railroad through a coal region in Arkansas was in the habit of permitting miners and shippers of coal to haul it to the station at Hartford, Ark., where it was loaded from wagons into cars furnished for that purpose by defendant on its side track. There were four other shippers of coal at Hartford besides plaintiff. Plaintiff did a good business and on the prospect of a continuance of it he purchased forty acres of coal land, near the Hartford station. His coal was shipped from Arkansas to points in Oklahoma and Texas.

Plaintiff alleged in his complaint that after August 1, 1901, and until February, 1902, defendant refused to set out coal cars on its side track, as it had done previously. That in October, 1901, defendant offered to furnish plaintiff cars for coal to be shipped within the State of Arkansas. Plaintiff had no customers for Arkansas shipments, and as defendant carrier refused to furnish plaintiff cars for interstate business he could do no business and alleged that by the act of the carrier his business was destroyed, and he claimed damages in the sum of \$6,000. In a second count of his complaint it was alleged that the carrier furnished cars to the four other shippers, competitors of plaintiff giving them an unreasonable preference and advantage, and unjustly discriminating against plaintiff. It appeared upon the trial that defendant was a miner and shipper of coal, as well as a carrier. It owned 1,600 acres of coal land near Hartford. The evidence further showed that when a shipper other than defendant desired to ship coal it was customary for him to make application to the carrier. The mine was examined by defendant's officers, and if the "quantity of coal therein seemed to be adequate to justify the expense, the practice was to make an agreement with the shipper, whereby the latter should secure a right

of way, and grade a track or spur from the mouth of the pit to the railroad, the latter agreeing to furnish the ties and rails, lay the track, and keep it in repair. In return for this outlay the shipper was to furnish for shipment coal for a certain number of cars per day, and to equip the track with tipples and screens, so that it could be quickly loaded. The practice of permitting loading from wagons, it was claimed, was a temporary arrangement pending construction of spur tracks and to permit development of mines.

When plaintiff was notified that no more cars would be furnished him he applied for a spur track, but the carrier refused to permit it to connect at its station, but insisted that the connection should be made elsewhere. How far the connecting point insisted on by the carrier was from the depot, the report fails to show. For this reason the negotiations for the spur track could not be consummated. On complaint to the State Railroad Commission defendant agreed to furnish plaintiff cars for shipment within the State and subsequently refused to furnish any cars. It also appeared in evidence that during the period when loading coal from wagons was permitted defendant had disposed of its coal lands, several mines had been opened in the vicinity of Hartford, and it had become a large shipping point for coal.

The court held, affirming the United States Circuit Court, that the facts did not establish a case of undue preference within the meaning and intent of the statute of Arkansas (Laws 1899, chap. 89) which declares in substance, that it shall be unlawful for a common carrier "to make any preference in furnishing cars or motive power" for the transportation of persons or property. The word "preference," the court said, "must be construed to mean preference as between persons occupying the same situation or relation to the carrier." That because plaintiff had not provided the spur track and tipples, as other shippers had done, the privilege he demanded of loading coal from wagons was different from the mode of loading practiced by other shippers. That the carrier has a right to make reasonable regulations as to the mode of loading cars applicable alike to all shippers, and that in discontinuing the practice of furnishing cars on side tracks to be loaded from wagons, it was not guilty of a legal wrong. *Harp v.*

*Choctaw Railroad*, 125 Fed. Rep. 445 (C. C. A., 8th Circuit, October, 1903).

**Facilities to Carrier — Express Companies.**— Express companies who are engaged independently of their forwarding business in operating railway lines are not governed by the provisions of the Interstate Commerce Act. One express company cannot sue another express company to compel defendant to furnish it with equal facilities on the same terms and conditions as are allowed other express companies. The rights and liabilities of such companies are governed by the common law. *Southern Express Co. v. United States Express Co.*, 88 Fed. Rep. 659 (August, 1898, C. C. Ind.) ; affirmed, March, 1899, 92 Fed. Rep. 1022.

In the case cited plaintiff sued two express companies. The relief prayed for was that defendants be enjoined from refusing to receive any and all parcels offered or delivered to them by complainants for transportation to consignees and from demanding pre-payment of their charges for transportation, from withholding sums known as "accrued charges," from refusing plaintiff the reasonable *pro rata* part of the charges complainants may earn upon express business originating off its line. On demurrers bill dismissed. *Ib.*

The court in the *Express Cases*, 117 U. S. 1, relied on in above case, held, that if the general public were complaining because the railroad companies refused to carry express matter or to allow it to be carried, a different question would be presented.

**Discrimination among Carriers — Conflict of Authority.**— The Interstate Commerce Act was intended to protect not only the shipper but the carrier. It expressly forbids unjust discrimination against the shipper. It also forbids unjust discrimination against connecting carriers seeking to make through rates and continuous carriage of freight over connecting lines. It requires that the carrier shall furnish the shipper equal facilities. It requires that a carrier shall furnish connecting carriers equal facilities for interchange of traffic, and section 7 specifically forbids any contract or combination among carriers by change of schedules or by carriage in different cars or other means or devices to prevent a connecting carrier from making through



shipments, and forbids breaking bulk, stoppage, or interruption as a device to evade the provisions of the act.

Notwithstanding these clear and explicit provisions decisions have been made holding that discrimination between connecting carriers are not violations of the act so long as the public are not inconvenienced.

The Supreme Court of the United States has never passed directly upon the interpretation which should be given to the last clause of the second paragraph of section 3 which declares that a carrier shall not be required to "give" the use of its tracks or terminal facilities to another carrier engaged in like business. This clause must be construed in connection with the first clause of the same sentence, which declares that every carrier according to its powers shall afford equal facilities for the interchange of traffic between respective lines for receiving, forwarding, and delivering, and forbids discrimination in rates and charges between connecting lines. These provisions are supplemented by like provisions in section 7 of the act. The authorities in regard to discrimination among carriers, however, are not uniform. There are some authorities in which carriers have been granted relief against connecting carriers.

On the other hand there are decisions holding that one carrier may use its tracks and terminal facilities in such a way as to discriminate in rates and charges with connecting lines. The courts in some cases have sustained the claim of a carrier that it has a right to permit one competing and connecting line to make through joint tariffs and routes over its line, and to refuse to make such tariffs with a competitor of the connecting line by imposing on one the necessity of reloading, rebilling, and prepaying freight, while it permits another to carry freight through to destination without breaking bulk, reloading, or rebilling, and arranging not only not to insist on prepayment of freight, but to advance the freight for the connecting line. It is obvious that if a carrier may thus discriminate in favor of a rival he may do so to an extent which will put its competitor out of business and destroy its property.

The Interstate Commerce Commission has construed the act to mean what it says. It has taken testimony in a number of cases and has ruled that while a carrier is not obliged to make

a contract for joint tariffs with a connecting line, yet if the carrier chooses to contract with one connecting carrier it will not be justified in refusing to another such carrier equal facilities and conditions, for the reason that to grant equal facilities to one and deny them to another would operate as an unjust discrimination within the meaning of the act. But the courts in the majority of cases have declined to enforce the orders of the Commissioners in this regard.

There is, however, one phase of the law bearing on this question which has not thus far been discussed in any reported decision, which amply supports the position taken by the Commission, which may be stated as follows: It must be conceded that the statute declares it to be unlawful for a carrier to discriminate against a shipper. Such discrimination has been uniformly held to be illegal. What authority is there then to support the proposition that a carrier may discriminate against a connecting carrier, even upon the theory that a carrier has a right to select its forwarding agent from among competing connecting lines. If such selection operates to discriminate unjustly against a competing connecting carrier, the statute declares the act to be unlawful. The right of a carrier to make through connections on the same terms and conditions as are given to competing connecting lines is a property right, as much so in a carrier as it is in a shipper. The connecting carrier like the shipper is entitled to the equal protection of the laws, under the Fourteenth Amendment, and cannot be deprived of its property arbitrarily or without due process of law. The law places all carriers engaged in interstate commerce upon an equality, in that one shall not discriminate against the other. The act of a carrier in refusing to give to a connecting line the same rate and facilities for through freight that it gives to a competing connecting line, whereby the business of the latter is diverted, injured, or destroyed, thereby deprives it not only of its property without due process of law, but by its act the competitor is deprived of the equal protection of the laws. Such an act clearly operates as a discrimination against the carrier injured, and such discrimination is expressly forbidden and declared to be unlawful by the Interstate Commerce Act.

The authorities on this branch of the law are as follows:

**Discrimination among Carriers — Equal Facilities Compelled.**

-- The New York and Northern railroad secured from the Interstate Commerce Commission an order requiring the New York and New England railroad to afford the petitioner equal facilities to those furnished by the New England road to the Housatonic railroad. Application was made to United States Circuit Court (So. Dist. N. Y.) to enforce the order. The petitioner charged that defendant had deprived the petitioner of reasonable, proper, and equal facilities (as compared with those afforded to the Housatonic road, a competing connecting line) for the interchange of traffic between petitioner and defendant. It was also shown that defendant discriminated against the petitioner in rates; that a contract for a joint through traffic, formerly in force, was withdrawn, and defendant threatened to close the through route *via* petitioner's line, and refused to accept freight at all on through bills, thus compelling petitioner's patrons to attend at Brewster's — the point of connection — to transfer and rebill their goods. The Commission found the facts in favor of petitioner and held that the defendant was guilty of discrimination in rates and charges for interchange of traffic and in arrangements for through lines for freight traffic. Defendant complied with the order in so far as to desist from refusing freight on through bills, and restored the joint through tariff. But defendant so arranged the running of its trains that the facilities for interchange were substantially no better than before service of the order. The court, LACOMBE, J., held that the order could not be evaded by the devices resorted to. *New York and Northern v. New York and New England*, 50 Fed. Rep. 867 (May, 1892, Cir. Ct. So. Dist. N. Y.).

In construing section 4 of the act, with regard to the long and short haul provision, it was held that two railroads cannot be compelled to unite in making joint through rates over connecting lines, if they do not choose to do so voluntarily. *Chicago Railroad v. Osborne*, 52 Fed. Rep. 912. But if a carrier chooses to make a joint through rate with another, and refuses to give the benefit of its facilities to a competitor, and declines to make equally favorable terms and conditions with the competitor, as



it has given its rival, such refusal constitutes an unjust discrimination in rates and charges between connecting lines, which is forbidden and made unlawful by section 3 of the act.

The New York and New England railroad made joint through tariff arrangements with two connecting competing lines, to-wit, with the New York and Northern, and with the Housatonic company. It afterward withdrew the joint through tariff agreement with the New York and Northern, refused to accept its freight on through bills, and threatened to close the through route *via* the Northern line. Held to be a deliberate refusal to "afford all reasonable, proper, and equal facilities for the interchange of 'traffic' with a connecting line which the statute makes it his affirmative duty to afford." *Ib.*

Judge LACOMBE, in a subsequent case (January, 1896, *Prescott and Arizona Railroad v. Atchison Railroad*, 73 Fed. Rep. 438), took occasion to refer to the *New York and Northern* case, above reported, and citing some latter cases in the Circuit Court of Appeals, bearing on a similar point, said, that he felt constrained to follow them as rulings of the Circuit Court of Appeals. He referred to *Little Rock v. St. Louis Railroad*, 63 Fed. Rep. 775; and *United States v. Trans-Missouri Freight Assoc.*, 7 C. C. A. 15; S. C., 58 Fed. Rep. 58.

He held accordingly in the *Prescott and Arizona* case, that a carrier could employ as its forwarding agent on through bills of lading without breaking bulk one of several competing carriers to the exclusion of the others. Under the authorities existing at the time of his decision Judge LACOMBE said he was obliged to hold that there was nothing in the Interstate Commerce Act to make such a contract unlawful, and further that such a contract with one carrier to the exclusion of other competitors was not a contract in unlawful restraint of trade, or creating a monopoly in violation of the Sherman Act of July 2, 1890. *Prescott and Arizona Railroad v. Atchison Railroad* (January, 1896, Cir. Ct. So. Dist. N. Y.), 73 Fed. Rep. 438. See also *St. Louis Drayage Co. v. Louisville Railroad*, 65 Fed. Rep. 39 (December, 1894, Cir. Ct. East Dist. Mo.); *Oregon Short Line v. Northern Pacific*, 61 Fed. Rep. 158 (C. C. A. 9th Circuit, April, 1894), affirming 51 Fed. Rep. 465.

Since the decision in the *Prescott and Arizona* case by

Judge LACOMBE, the Supreme Court of the United States has reversed the *Trans-Missouri* case (166 U. S. 290), holding that the contract which was the subject of complaint in that case was illegal and void, and created a monopoly in restraint of trade in violation of the Sherman Anti-Trust Law of July 2, 1890. Compare also the case decided in April, 1896. *Augusta Railroad v. Wrightsville Railroad*, holding that such an agreement by a carrier with a connecting line to the exclusion of competitors was illegal, created an unjust discrimination, and could be remedied by invoking a writ of *mandamus* to compel the resisting carrier to forward the freight of the competitor on like terms, and furnish like facilities as were furnished to the rival competitor. *Augusta Railroad v. Wrightsville Railroad*, 74 Fed. Rep. 522 (April, 1896, Cir. Ct. So. Dist. Ga.). For a fuller report of this case, see *post*, page 239. See also *Bigbee Packet Co. v. Mobile Railroad*, 60 Fed. Rep. 545, *ante*, page 73, which holds that a connecting carrier discriminated against by another carrier who sustains damages thereby may sue at law, and recover such damages.

**Discrimination among Carriers — Relief Refused.**— The authorities holding that a carrier, though it cannot discriminate against a shipper, may, under circumstances to a limited degree, discriminate against a connecting carrier, provided the public are not thereby inconvenienced, are as follows:

**Discrimination among Carriers — Advance Payments — Through Billing.**— It has been held that a common carrier engaged in interstate commerce may lawfully discriminate against another carrier under the Interstate Commerce Act by demanding payment of freight charges in advance when such freight is delivered to it by a connecting carrier. It was held further that it was not an unlawful discrimination for such carrier to receive the freight of another connecting carrier without exacting freight charges in advance. A carrier may, if it chooses, advance freight charges to one connecting carrier and refuse to make such advances to another connecting carrier. *Gulf Railroad v. Miami SS. Co.*, 86 Fed. Rep. 407 (C. C. A. March, 1898), reversing lower court.

One carrier may, if it chooses, contract with one connecting

carrier for through transportation, through joint traffic, through billing, and for the division of through rates. A refusal to make a similar contract with another competing or connecting carrier the court held would not operate as a discrimination or unlawful prejudice under section 3 of the Interstate Commerce Act. *Ib.*

As to whether such acts, whereby equal facilities were granted one carrier to the exclusion of another, created a monopoly, condemned by the Sherman Anti-Trust Act, the court did not decide, for the reason that that question could be raised only in an action brought by or on behalf of the government of the United States as a party plaintiff. *Ib.*

The carrier can, however, in a suit brought by it, sue a connecting carrier for treble damages under section 7 of the Sherman Act, if it can show that it has been injured in its business or property by the unlawful act of such carrier. See Sherman Act, section 7, *post*, page 145.

**The Little Rock Cases.**— The plaintiff's road extended from Memphis to Little Rock; the defendant's road extended from Memphis to Little Rock, and thence south into Texas. The defendant refused to contract with plaintiff for through routing and through rating over its road. Plaintiff claimed also that defendant contracted with the Bald Knob branch road and the Hot Springs road to sell through tickets from Memphis and to points south over the roads of the latter companies, and that the latter sold through tickets over their own and defendant's roads and refused to sell through tickets to Memphis and points south over plaintiff's road on same terms and conditions. Plaintiff prayed for an injunction commanding the defendant, the Hot Springs road, and its agents to sell through tickets to Memphis and points south, over plaintiff's road on same terms as charged to persons buying tickets over the Bald Knob branch, and to check baggage with same. The court held that it was not an unjust and unfair preference or discrimination for defendant to sell tickets over its own line, in preference to plaintiff's, and that the court had no power to compel it to do so. Injunction denied and bill subsequently dismissed. *Little Rock Railroad v. St. Louis Railroad*, 41 Fed. Rep. 559 (March, 1890, Cir. Ct. ed. Ark.).



The question as to whether the making of the contract complained of between the defendant carriers and defendant's refusal to carry persons over plaintiff's road amounted to a "discrimination in rates and charges between connecting lines" in violation of section 3 of the act, was not raised, discussed, or passed upon by the court in the above case. But that question was litigated in the case of the *Little Rock Railroad v. East Tennessee Railroad*, 47 Fed. Rep. 771, based on facts substantially similar.

In the case referred to it was alleged that the defendants, the Iron Mountain and East Tennessee roads, had entered into a traffic arrangement whereby they sold through tickets to points beyond Little Rock, over the Bald Knob branch of the Iron Mountain, the benefits of which were refused to plaintiff. The Iron Mountain refused to sell through tickets over plaintiff's road to Memphis and points beyond. The East Tennessee refused to sell through tickets over plaintiff's road and the Iron Mountain refused to recognize such tickets on its road. Plaintiff claimed that defendant carriers thereby unjustly discriminated against it. Defendants demurred to the bill. The court sustained the demurrer, holding that the facts alleged did not constitute unjust discrimination among the carriers. "It is a misnomer," said the court, "to call that which the Iron Mountain is doing 'a discrimination' against the plaintiff under the act. It is not the case of a road preferring unjustly, unduly, and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so doing its business and using its powers of ownership as to divert travel from its rival to itself." *Little Rock Railroad v. East Tennessee Railroad*, 47 Fed. Rep. 771 (September, 1891, Cir. Ct. West. Dist. Tenn.).

#### **Little Rock Cases — Facilities to Carrier — Use of Tracks.—**

In suits brought in the eastern district of Arkansas by one carrier against other carriers for a violation of the second clause of section 3 for refusal by defendants to furnish plaintiff, a competing connecting carrier, equal facilities for interchange of traffic, the court on demurrer dismissed the bills and denied plaintiff the relief sought. This apparent violation of the pro-

visions of the statute was excused on the ground of ownership of the through line. The court said that defendants were not required to allow plaintiffs "the use of their tracks" to enable plaintiff to do business as a carrier of interstate commerce. As the relief sought could not be granted without the use of defendant's tracks, and requiring defendants to haul freight in other cars than their own, over their own tracks, at a less rate than they would receive if the freight was hauled in their own cars, the relief could not be granted. The court held further that defendant operating a connecting road, while it permitted through billing and routing to one of defendants, could not be required to give the same facilities to plaintiff, although they possessed all the necessary tracks and terminal facilities. That defendant could insist that all freight offered by plaintiff must be carried in defendant's cars, and that defendant could lawfully require reloading and rebilling at local rates. That defendant could permit the use of its tracks to one competing connecting line to the exclusion of another. *Little Rock Railroad v. St. Louis and Iron Mountain* (January, 1894), 59 Fed. Rep. 400; affirmed, September, 1894, 63 Fed. Rep. 775. See also *Cowan v. Bond*, 39 Fed. Rep. 54 (May, 1889, Cir. Ct. So. Dist. Miss.). See also *Oregon Short Line v. Northern Pacific*, 61 Fed. Rep. 158 (C. C. A., 9th Circuit, April, 1894), affirming 51 Fed. Rep. 465, holding that a carrier may agree to prepay freight received by it from one connecting carrier and refuse to do so for another competing connecting carrier. Compare *New York and Northern Railroad v. New York and New England*, 50 Fed. Rep. 867, *ante*, page 82, and cases *supra*.

**Little Rock Cases in Supreme Court.**—The Supreme Court of the United States did not pass upon the merits involved in the discussion in the Little Rock cases. They were dismissed upon a technicality as to the jurisdiction of the Supreme Court at that time. In the case of *Little Rock and Memphis v. East Tennessee* an appeal was taken directly to the Supreme Court from a decree of the Circuit Court of the United States for the western district of Tennessee. The Circuit Court had dismissed the complainant's bill in its suit in equity for an injunction to enforce an order of the Interstate Commerce Commission for refusal to afford complainant "the same equal facilities as are

afforded to any other connecting road," and for other relief. The Supreme Court held that as the law then existed the appeal would not lie unless it clearly appeared that the subject in dispute shall be of the value of \$2,000. Appeal dismissed. *Little Rock and Memphis v. East Tennessee*, 159 U. S. 698, December, 1895. Citing *Interstate Com. Co. v. Atcheson Railroad*, 149 U. S. 264.

The court, in the case of the *Little Rock v. St. Louis and Iron Mountain* (59 Fed. Rep. 400; affirmed, 63 Fed. Rep. 775), holding that a carrier, while giving through facilities to one connecting line, could compel another to use different cars, break bulk, and re-load, did not refer to section 7 of the Commerce Act, nor construe the provisions of that section which forbids a carrier to compel carriage in different cars, or change of time-table, or breaking bulk, stoppage, or interruption when used as a device to prevent the carriage of freight from being continuous, or to evade in anywise the provisions of the act.

On the question of discrimination by a carrier in making joint through rates with one connecting line to the exclusion of another, the language of Judge LACOMBE, in the *New York and Northern* case above cited, is still pertinent, since the decision reversing the *Trans-Missouri* case (166 U. S. 290), and the recent decisions in the *Addystone Pipe* case and the *Northern Securities Merger* case. In the *New York and Northern* case, the court enforced the order of the Interstate Commerce Commission directing the discrimination against the plaintiff carrier to cease. Judge LACOMBE, in the case referred to, said: "The only link between them, *i. e.*, between the New York and New England Company and the Housatonic Company, is such community of interest as springs from the existence of the contract for the interchange of traffic, which it is claimed secures the Housatonic road unequal facilities. If it be that such a contract makes each line a mere continuation or extension of the other it is hard to conceive how a case, of refusing equal facilities, could ever be made out." The court granted the relief prayed for and enforced the order of the Interstate Commerce Commission requiring defendant company to afford plaintiff equal facilities with the Housatonic Company and to cease discrimination against plaintiff in through rates. *New York and Northern Railroad v. New York and New England*, 50 Fed. Rep. 867.



**Through Rates — Liability of Connecting Lines.**— In the absence of an agreement to extent its liability beyond its own lines a carrier taking freight and passengers for transportation to points on connecting lines is not liable for loss or injury resulting beyond its own line. And an advertisement by the carrier that it runs or connects with trains of another company, so as to form through lines without breaking bulk or transferring passengers, is not sufficient to establish a contract under which profits and losses are shared with connecting lines, so as to render the carrier liable beyond its own line. *Pennsylvania Railroad v. Jones*, 155 U. S. 333.

**§ 4. Long and Short Haul Regulations — Power of Commission as to.**— That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

**Object and Scope of Section 4.**— The provisions of this section, familiarly known as the “long and short-haul clause” of

the act, was intended to protect shippers in certain localities from being discriminated against in favor of shippers in localities farther from the initial point of shipment. Goods are shipped on through bills of lading across the continent from New York, Boston, Baltimore, and other ports on the Atlantic seaboard to San Francisco, Los Angeles, Portland, and other points on the Pacific coast, and to the multitude of intermediate points. The intention of Congress was to protect a shipper, whose goods were carried but a short distance, from paying more for transportation of his merchandise than a shipper whose goods were carried, under similar circumstances and conditions, a much longer distance in the same direction.

In construing this most important section the Supreme Court of the United States have laid down the rule, in some cases, that competition, no matter where it originates, and whether actual or potential, creates a dissimilarity of circumstances and conditions, which will justify the carrier in charging more for a short than for a long haul over its line for like merchandise carried in the same general direction. The question, therefore, as to what constitutes *bona fide* competition seems to be the principal inquiry involved in controversies arising under section 4.

**Domestic Commerce — Long and Short-haul Clause.**— A State may constitutionally prohibit a short-haul charge in excess of a long-haul charge in case both hauls are within the limits of the State. But if the direct result of a rate fixed by State law or the State Railroad Commission on points within its borders operates to regulate the interstate rate fixed by the carrier so as to impair its business, the local rate fixed by the State will be held to be a regulation of interstate commerce and void for that reason. *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27.

Defendant's road extended from Nashville, Tenn., to Louisville, Ky., a distance of 185 miles. The road passed through Franklin, Ky., and the distance from Franklin to Louisville, Ky., was but 134 miles. The rate charged upon tobacco from Knoxville to Louisville was twelve cents per hundred pounds, while upon tobacco shipped by Eubank, defendant in error, from Franklin to Louisville, he was charged twenty-five cents per hundred. Under the Constitution and laws of Kentucky this rate

of twenty-five cents per hundred on tobacco shipped from Franklin to Louisville was claimed to be illegal, because it was greater than the charge imposed for hauling tobacco from Knoxville to Louisville, for which the rate was but twelve cents per hundred. Eubank sued the carrier to recover the excess, to-wit, thirteen cents per pound on 145,245 pounds of tobacco, shipped by him from Franklin to Louisville. The carrier demurred and the demurrers were overruled by the Circuit Court of Simpson county, Kentucky. Defendant then interposed special pleas to which plaintiff demurred and judgment was given sustaining these demurrers and awarding plaintiff judgment for \$181.88, the excessive freight and costs. The case went directly to the United States Supreme Court, no ruling having been made thereon by the Supreme Court of Kentucky, presumably for the reason that the amount involved gave no right to review in the Supreme Court of the State. The judgment was reversed in the Federal court, upon the ground that by the demurrer it was admitted that the carrier would be obliged to give up its business of hauling freight from Nashville to Louisville unless it made its rate twelve cents per hundred, which is below what is fair and reasonable between those points by reason of water competition. That if the rate were fixed at twenty-five cents per hundred between the points named the carrier averred it could get no business. For this reason it claimed that the operation of the State Constitution and the statute based on it operated to interfere with a regulation of interstate commerce and was, therefore, void. The majority of the court held that the operation of the laws of Kentucky on the facts admitted by the demurrer affected a regulation of interstate commerce, although it related directly to points of shipment in Kentucky and was, therefore, void. *Id.*

**Long and Short Haul — Competition Primary Factor.**— In construing the provisions of the Interstate Commerce Act with respect to the long and short-haul clause, regard must be had to the competition which exists to points affected. *Interstate Com. Co. v. Alabama Railroad*, 168 U. S. 144.

The Board of Trade of Troy, Ala., complained that defendants charged a higher rate for goods shipped from the seaboard to Troy than on shipments of similar goods carried through Troy



to Montgomery, a point a longer distance than Troy, being distant fifty-two miles farther. It was claimed that Troy was in active competition with Montgomery for business, and that defendants discriminated unjustly in their rates against Troy and gave to Montgomery an undue preference or advantage on certain commodities, charging as follows: \$3.22 per ton on phosphate rock to Troy, and but \$3 per ton to Montgomery, and all such rock hauled to Montgomery must of necessity be hauled through Troy. That rates on cotton shipped to Atlantic ports were forty-seven cents per hundred from Troy and only forty cents from Montgomery, a longer distance, and other like discriminations set forth in the complaint. After a full hearing before the Interstate Commerce Commission the latter made an order directing the carriers "to cease and desist" from charging more on shipments to Troy than to Montgomery on cotton and other commodities set forth in detail in the order. The carriers, who claimed that the circumstances and conditions between the points were dissimilar, by reason of competition, refused to obey the order and the Commission filed a bill to compel obedience to it. The bill was dismissed and the dismissal affirmed in the Court of Appeals. In the United States Supreme Court (HARLAN, J., dissenting) the decree appealed from was affirmed. *Ib.*

The court held that the existence of competition between competing carriers was a fact which rendered conditions of shipment under the long and short-haul clause of the act substantially dissimilar. That the second section of the act forbidding special rates, rebates, and drawbacks competition affecting rates had no application. *Ib.*

The court, in order to limit the scope of its decision in this regard, observed: "We do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraint of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.'" *Ib.* Citing *Cincinnati Railway v. Interstate Com. Co.*, 162 U. S. 184; *Texas and Pacific v. Interstate Com. Co.*, 162 U. S. 197.

**Long and Short Haul — Competition.**— The fourth section of the Interstate Commerce Act is violated if the carrier charges more for a shorter than for a longer distance, and the circumstances and conditions at the longer distance point are substantially similar to those at the shorter distance point. But if it is shown that the circumstances and conditions at the longer distance point are substantially dissimilar the statute has not been violated. *Interstate Com. Co. v. Western Railroad* (June, 1898, Cir. Ct. No. Dist. Ga.), 88 Fed. Rep. 186; affirmed, 93 Fed. Rep. 83.

Competition at a given point will create such dissimilarity in circumstances and conditions as will justify the carrier in charging more for a short than for a long haul over its line. But the competition must be *bona fide* and substantial and not imaginary or trifling. Such charge if justified by genuine competition can scarcely be said to create an undue or unreasonable preference under section 3. Section 2 of the act deals wholly with shippers and moneys paid by them to the carrier, and does not relate to inequality of rates with respect to particular localities. *Ib.*

One of the circumstances to be considered which will justify the carrier in charging more for a short than for a long haul is competition, not merely between carriers by rail and carriers by water, but competition generally between rival carriers. "That which the act does not declare unlawful," says Judge COOLEY, "must remain lawful if it was so before, and that which it failed to forbid, the carrier is left at liberty to do without permission of any one." *Brewer v. Central Georgia Railroad*, 84 Fed. Rep. 258 (January, 1898, Cir. Ct. So. Dist. Ga.).

In the case cited plaintiffs, wholesale merchants of Griffin, Ga., secured from the Interstate Commerce Commission an order directing defendant to desist from charging greater freight rates from Cincinnati and Louisville to Griffin than it charged from the same points to Macon, being sixty miles farther. The action was brought in the United States Circuit Court, southern district of Georgia, to enforce the order. The court, after a careful review of the facts, denied the application for a mandatory injunction, and dismissed the bill. The court held that the facts showed that the competition existing at Macon created

a dissimilarity of circumstances and conditions which justified the increased charge for the shorter haul. *Ib.*

Where a greater charge is made for a shorter than for a longer haul by the carrier, it is competent for the carrier to show the existence of competition to justify the rate charged, if it appears that such competition has a substantial and material affect upon traffic and rate making, even though the competition is between carriers who are all subject to the Interstate Commerce Act. *Interstate Com. Co. v. Southern Railway*, 105 Fed. Rep. 703.

The court was asked to enforce an order of the Interstate Commerce Commission directing defendants to desist from charging more for freight carried from Atlantic ports to Piedmont, Ala., than was charged for freight from same points to Anniston, Ala., a shorter distance. The Commission ruled that the evidence showed that the rates to Piedmont were not, in themselves, excessive or unreasonable, but that they were unreasonable and unjust as compared with the rates to Anniston in that they gave to the latter city an undue preference or advantage, and subjected the former to an undue prejudice or disadvantage in territory in which they meet in active competition. The court held that the evidence offered by the carriers of competition among carriers to the points in question should have been considered. If the evidence justified the conclusion that it was *bona fide*, it was a justification of the rates charged, because the conditions and circumstances became thereby substantially dissimilar. *Ib.*

Citing *Interstate Com. Co. v. United States*, 162 U. S. 197; *Railroad v. Behlmer*, 175 U. S. 654; *Interstate Com. Co. v. Alabama Railway*, 168 U. S. 144.

#### **Bona Fide Competition — Dissimilarity — Discrimination.—**

When a violation of the long-and-short-haul clause of the Interstate Commerce Act is charged, competition is one of the elements which enter into the determination whether the conditions are similar. If a dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. *East Tennessee R. Co. v. Interstate Com. Co.*, 181 U. S. 1. Citing *Texas & Pac. R. Co.*



*v. Interstate Com. Co.*, 162 U. S. 197; *Interstate Com. Co. v. Alabama R. Co.*, 168 U. S. 144; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, and reversing decree of Court of Appeals, 99 Fed. Rep. 52.

In fixing rates to and from competitive and noncompetitive points, the carrier may take into consideration the competition which exists, and as to whether such competition is substantial and controlling upon rates. Such competition is in and of itself the dissimilarity of circumstances and conditions described in the statute. *Ib.*

The Board of Trade of Chattanooga, Tenn., sought redress from the Interstate Commerce Commission for an alleged violation of the long-and-short-haul clause of the Interstate Commerce Act. It was alleged that on freight shipped from Boston, New York, Philadelphia, Baltimore, and points on the eastern seaboard, through Chattanooga, to the cities of Nashville and Memphis, far beyond Chattanooga, certain carriers charged more for freight shipped to Chattanooga than to the more distant points, Nashville and Memphis, thus not only violating the long-and-short-haul clause of the act, but discriminating against Chattanooga. *Held*, that in fixing the rate, it was shown that the carriers were compelled, by reason of the competition which existed in rates to the more distant cities of Nashville and Memphis, to charge less for freight to those cities than was charged to Chattanooga, which was a non-competitive point. That the existence of this competition rendered the circumstances of shipments to the respective points dissimilar within the meaning of the statute, although the lesser charge to the competitive point may seemingly give a preference to the latter. *Ib.*

The following table shows the rates charged by the carriers to Chattanooga, Memphis, and Nashville, respectively, and which was the subject of complaint:

CLASSES OF FREIGHT.	1	2	3	4	5	6
To Chattanooga . . . . .	114	98	86	73	60	49
To Memphis, 310 miles further. . . .	100	85	65	45	38	35
To Nashville, 151 miles further. . . .	91	78	60	42	36	31

It was thus shown that the carriers charged for transporting 25 to 60 per cent. less from New York through to Nashville, than from New York to Chattanooga over the same tracks and in the same trains, the distance to Chattanooga being 151 miles less than to Nashville. Defendants sought to justify by claiming that they encountered competition at Nashville. Potential, but not actual, competition was suggested by reason of water rates, which might be had on boats plying the Cumberland river from Evansville and Cincinnati, at least during part of the year. Defendants also claimed competition to Nashville, created among the carriers themselves. The Circuit Court and Court of Appeals held, Judge TAFT writing the opinion, HARLAN and LURTON concurring, in the Court of Appeals, that there was no evidence to sustain the claim as to water competition, and that the competition among the carriers resulted in an agreement among themselves, which practically amounted to an agreement in restraint of trade to stifle competition. The Supreme Court reversed the Court of Appeals, assigning error in excluding certain evidence on these points before the Commission. *Ib.*

**Judge Taft on Actual and Potential Competition.**— In reversing the *East Tennessee* case, the Supreme Court (181 U. S. 1) said that such reversal was without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to hear and determine the matter according to law. How far, upon such re-hearing, the views of the Circuit Court of Appeals, as expressed by Judge TAFT, may be pertinent could be ascertained only upon a second trial of the case and in view of additional evidence, since the reversal was upon the authority of the *Behlmer* case, 175 U. S. 648. The opinion of Judge TAFT on the question of competition in the *East Tennessee* case, in which Justice HARLAN, sitting in the Court of Appeals, concurred, is interesting. Judge TAFT said:

“It is contended on behalf of the defendants that the circumstances and conditions of their Nashville business are not similar to those of their Chattanooga business, in that at Nashville they encounter competition which they must meet by lowering their rates in order to secure any business at all, while at Chattanooga such competition does not exist. This competition is said to be of two kinds:

"First, the potential, but not actual, competition afforded by the situation of Nashville on the Cumberland river, by which it may be reached nine months in the year by steamboat from Evansville and Cincinnati. This gives Nashville water communication with points on the east and west trunk lines whose rates are  $33\frac{1}{2}$  per cent. less than the southern rates, and thus, it is said, makes it practically a trunk-line point. The evidence does not sustain the claim that in respect to through rates from New York to Nashville *via* Ohio river points the river competition has any effect whatever. The witnesses for the defendants admit that no through freight from New York to Nashville is ever carried by the Ohio and Cumberland rivers; and this although the rates by river are from 20 to 25 per cent. less than the proportion of the through New York rate to Nashville, collected by the Louisville & Nashville Railroad Company for carriage from Cincinnati to Nashville. But it is said that if the rate is increased to Nashville so as to make it the same as that to Chattanooga then the river lines will become formidable competitors of the Louisville & Nashville Railroad Company in the through traffic; and freight experts have been produced by the defendants who vaguely express the opinion that to increase the additions made to the trunk-line rates from New York to Cincinnati by the Louisville & Nashville Railroad Company, for its part of the through carriage to Nashville, would induce river competition on this traffic.

"There has been presented to us an able argument to show the powerful effect of potential water competition upon railway rates in cases where comparatively a small percentage of the freight is actually carried by water. The effect of the Erie canal upon grain rates of freight is cited as a significant illustration. We fully concede much of what is contended on this head, but we find it to have little or no application to the case in hand. It appears by the undisputed evidence that the rates of the Louisville & Nashville railroad from Cincinnati, Louisville, and Evansville have practically destroyed, not only the New York through business by river, but the local river business from those points to Nashville. The total amount of traffic on the Cumberland river to Nashville is so insignificant, as compared with the local traffic to the same place, that it is not worthy of notice. Now, the local railway rates to Nashville from Ohio river points are about 50 per cent. higher than the through rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga, the Louisville & Nashville company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum, it is clear that any increase on through rates, under which they would still be



less than local rates, cannot affect river competition at all. In other words, the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elect to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate. We may, therefore, eliminate Cumberland river competition as a factor in reaching our conclusion.

“The next question for our consideration is whether the competition of the trunk lines to Cincinnati, and of the Louisville & Nashville railroad to Nashville, makes the conditions of defendants’ traffic at that place different from those at Chattanooga. It is settled in the case of *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S. 144, 164, 167, 18 Sup. Ct. 45, 42 L. ed. 414, that competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar; that the mere fact of competition, however, no matter what its extent or character, does not necessarily relieve the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude consideration of competition in determining dissimilarity of conditions, and that competition may in some cases be such as, having due regard to the interests of the public and the carrier, ought justly to have effect upon the rates. It is then the duty of the commission and the reviewing courts in such cases to consider, not only the extent, but the character, of the competition relied on as a justification for discrimination against the nearer point. It must, therefore, be relevant to ask why such competition is not also present at the nearer point. If the answer to the question is found in the absence at the nearer point of competing railway lines, of water competition, and of other circumstances naturally creating competition, then the further point may be reasonably held to be merely enjoying in its lower rates its normal advantages, which may and do justly overcome the mere disadvantage of the greater distance of the haul. But when we find that the nearer point has not only the advantage of less haul, but also more railway lines in actual competition, and that there are no other circumstances of substantial advantage in favor of the more distant point, we have a case which the fourth section of the Interstate Commerce Law was passed to meet.

“It is argued that the fact of competitive lower rates at the more distant point speaks for itself, and that no amount of argument can demonstrate a similarity of condition in the face of such a rate. This is only one of many arguments advanced on behalf of appellants, which, reduced to their last analysis, involve, as a major premise, that the existence of a rate and

movement of business under it are a complete justification of it, and foreclose judicial investigation. Such an assumption renders the Interstate Commerce Law nugatory and useless. There are other causes than normal competition that produce discriminatory rates. The Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. But it is not in accord with its spirit or letter to recognize, as a condition justifying discrimination against one locality, competition at a more distant locality, when competition at the nearer point is stifled or reduced, not by normal restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the so-called Federal Anti-Trust Act. *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; *U. S. v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259; *U. S. v. Addystone Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. Certainly such a difference in conditions ought not to justify a difference in rates before the Commission or the court.

"Chattanooga is 151 miles nearer than Nashville to New York by the southern and most direct routes. It has at least three through competing southern lines from New York under different managements. These lines reach Nashville over one road from Chattanooga. Chattanooga is connected with Cincinnati, where the stream of traffic of the east and west trunk lines is reached, by a railroad 335 miles in length. Nashville reaches the same city by a railroad 295 miles in length. So far as the record shows, the conditions of railroad transportation between Cincinnati and Nashville are not substantially different from those between Cincinnati and Chattanooga. Both the Louisville & Nashville and the Cincinnati Southern are southern roads. The Louisville & Nashville does not encounter as much unrestricted competition at Nashville as the Cincinnati Southern at Chattanooga, for the only other line entering Nashville is the Nashville & Chattanooga company, of which the Louisville & Nashville company owns more than one-half the stock. But it is said that the Louisville & Nashville company is vitally interested in building up Nashville by enabling her merchants to compete with those of cities on the Ohio river. Why should the interest of this company be any greater in Nashville than that of the Cincinnati Southern railroad in Chattanooga? The difference in the Chattanooga and Nashville rates is to be found in something other than the physical conditions existing at the two cities; for, regarding them alone, there is no reasonable ground for any substantial disparity. The evidence shows that



the rates to Chattanooga from Cincinnati and from the eastern seaboard have always been fixed and agreed upon by an association of the southern railway and steamship companies. The Louisville & Nashville company has not been a member of it, but the Nashville, Chattanooga & St. Louis company, of which the Louisville & Nashville company owns a majority of the stock, has always been a member; and so has the Georgia Central Railroad & Banking Company, whose road from Atlanta to Savannah the Louisville & Nashville company jointly operates.

"The association has grouped Chattanooga with a large number of towns to the south of it for the same rates, and all the members of the association make their rates to Chattanooga accordingly. The Cincinnati, New Orleans & Texas Pacific railway has been a member of this association, and it is the agreement between it and the other lines at Chattanooga which has prevented the lowering of its New York rate. Without such an agreement, it is not possible to see why normal competition would not give Chattanooga substantially the same rates as Nashville. The result of the agreement is to deny to Chattanooga the natural advantage which direct connection with Cincinnati secures to Nashville, and ought to secure to Chattanooga. The agreement is more than a mere tacit understanding resulting from a praiseworthy desire to avoid rate wars and the carriage of goods at less than cost; for the rates to Nashville are admitted to pay a profit over the cost of transportation, and they are from 25 per cent. to 50 per cent. less than the Chattanooga rate for a considerably longer haul, with no apparent difference in conditions.

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"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the Interstate Commerce Act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the South, this is no ground for refusing to do justice to Chattanooga. The truth is that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates,



when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of re-adjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse."

**Danville and Lynchburg Cases.**—The grounds of complaint were based substantially on the claim that the through rate made by defendants from the west *via* Lynchburg to Danville was greater than the rate to Lynchburg, and that the rate to Richmond *via* Lynchburg was less than that to Danville, though the latter was nearer to the shipping points than Richmond. The principal grievance against the Southern railway was as to the rate charged for freight between Lynchburg and Danville.

The following table shows the rates per 100 pounds to Lynchburg and Danville:

	Class 1.	Class 2.	Class 3.
Boston to Lynchburg .....	54	47	28
Boston to Danville.....	71	63	52
New York to Lynchburg.....	54	47	38
New York to Danville.....	66	58	47
Baltimore to Lynchburg .....	49	42	33
Baltimore to Danville .....	60	52	41
Chicago to Danville.....	108	90	70
Chicago to Lynchburg .....	72	62	47

	Sugar.	Molasses.	Coffee.	Rice.
New Orleans to Lynchburg.....	32	26	40	32
New Orleans to Danville.....	43	37	51	42

Tobacco rates to Louisville:

From Richmond .....	24
From Lynchburg .....	24
From Danville .....	40

It was shown that the Southern did not share in the competitive through rate from the west to Lynchburg, Richmond, and Norfolk, charged by the other carriers. The water competition from New Orleans was shown to have a direct effect upon rates to Norfolk and Richmond.

The defense was the usual one, that active competition created a dissimilarity of circumstances which excused the carrier for charging more for the short than the long haul. The court held that the evidence showed that the low rates to Lynchburg and Richmond were due to active legitimate competition, and that the local rates charged by the Southern from Lynchburg to Danville were not *per se* unreasonable. *Interstate Com. Co. v. Southern Railroad*, 122 Fed. Rep. 800 (C. C. A., 4th Circuit, May, 1903), affirming 117 Fed. Rep. 741.

**La Grange Cases.**— Where a lower rate is given to a point on the carrier's line as a result of competition, the making of such rate does not violate the long-and-short haul clause of the Interstate Commerce Act. The carrier, in order to give a particular point the benefit of proximity to a competitive point, may take into consideration the rate at the point of competition as a basis of rates to the point in question. *Interstate Com. Co. v. Louisville Railroad*, 190 U. S. 273.

The carrier charged less for freight shipped through from New Orleans to Atlanta, the longer distance point, than was charged, in the same direction, from New Orleans to La Grange, Hogansville, Newman, Palmetto, and Fairburn. The carrier made the rates from New Orleans to La Grange by taking the rate from New Orleans through to Atlanta and adding thereto the local rate from Atlanta back to La Grange. This rule was enforced as to stations between La Grange and Atlanta, to-wit, Hogansville, Newman, Palmetto, and Fairburn. *Held*, that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta. That this competition created a dissimilarity of circumstances which justified lesser charges for carriage of freight from New Orleans to La Grange and the shorter distance points. *Ib.*

*Held* further, that where the ruling that the rate to the nearer points was in violation of the Interstate Commerce Act

was based on an error of law, it was not proper to conclude the question of the inherent unreasonableness of rates, but to leave it open for future action by the Commission. *Ib.*

**Social Circle Case.**— The Georgia Railroad Company controlled a line of road across the State of Georgia extending from



TERRITORY, MILAGE AND DISTANCES IN SOCIAL CIRCLE CASE.

the city of Atlanta to the city of Augusta, a distance of 171 miles, both terminals being in the State of Georgia, the entire road being within that State. Social Circle is a point on its line, 52 miles east of Atlanta and 119 miles west of Augusta. The Georgia road, by arrangement with the Western Atlantic railroad, extending from Atlanta, its western terminal, to Chat-



tanooga, Tenn., and with the Cincinnati, New Orleans and Texas Pacific, extending from Chattanooga to Cincinnati, Ohio, was enabled to make through bills of lading on goods shipped from Cincinnati to points on its own line from Atlanta to Augusta, on the Savannah river, the eastern boundary of the State of Georgia. The entire distance over these three roads from Cincinnati through Chattanooga, and through Atlanta to Augusta, the farthest terminal, was 645 miles. The distance from Cincinnati to Atlanta was about 474 miles, and from Atlanta to Augusta, over the Georgia road, the distance was about 171 miles.

Merchants in Cincinnati, on goods shipped from that city, were charged the same rate of freight, whether the merchandise was shipped to Atlanta, a distance of 474 miles, or to Augusta, a distance of 645 miles. On goods, however, which were shipped from Cincinnati to Social Circle, a distance of 526 miles, the freight charged was 30 cents per 100 pounds more than was charged for shipping the same kind of merchandise either to Atlanta or to Augusta. The through rate from Cincinnati to Atlanta or Augusta was \$1.07 per 100 pounds. The through rate from Cincinnati to Social Circle was \$1.37 per 100 pounds. The division of the tariff on these rates, on through bills at \$1.07 per 100 pounds, was as follows: To the Cincinnati and Texas Pacific, 55  $\frac{7}{10}$  cents; to the Western and Atlantic, 22  $\frac{9}{10}$  cents; to the Georgia railroad, 28  $\frac{4}{10}$  cents. On the Social Circle rate of \$1.37 per 100, the division was as follows: To the Cincinnati and Texas Pacific, 75  $\frac{9}{10}$  cents; to the Western Atlantic, 31  $\frac{1}{10}$  cents; to the Georgia, 30 cents. This rate of 30 cents per 100 was the local rate which the Georgia road charged on local freight carried by it from Atlanta to Social Circle. It will be observed that the rate from Cincinnati to Social Circle was made by adding to the through rate to Augusta of \$1.07, the local rate of 30 cents from Atlanta to Social Circle.

Cincinnati merchants manufacturing buggies consigned by them from Cincinnati to Atlanta, Augusta, Social Circle, and other points in the State of Georgia, filed a complaint before the Interstate Commerce Commission against the three railroads above named, alleging that they were common carriers

"under a common control, management, or arrangement for continuous carriage or shipment" from Cincinnati to points in the State of Georgia. They alleged that the rates charged by defendants were in violation of section 4 of the Interstate Commerce Act, in that defendants charged more for carrying goods from Cincinnati to Social Circle, a distance of 526 miles, than they charged for goods shipped from Cincinnati to Augusta, a distance of 645 miles, under similar circumstances and conditions. They claimed that defendants had no right to charge more for the shorter than for the longer haul in the same direction. Testimony was taken before the Commission which resulted in an order commanding the defendants to cease and desist from making any greater charge in the aggregate on freight of the same class, carried from Cincinnati to Social Circle, than charged on such freight from Cincinnati to Augusta. The order was disobeyed, and an action was brought by the Commission in the United States Circuit Court to enforce it. The bill was dismissed, but on appeal the Circuit Court of Appeals reversed the decree and remanded the case, with instructions to enter a decree in favor of the Commission against the defendants as prayed for. (64 Fed. Rep. 981.)

Upon an appeal to the Supreme Court of the United States the decree of the Circuit Court of Appeals was affirmed. The court held that although the Georgia railroad operated its line wholly within one State, it became subject to the provisions of the Interstate Commerce Act by entering into an arrangement for continuous carriage or shipment from points in other States to points in the State of Georgia; thereby, its road became part of a continuous line from Cincinnati, Ohio, to Augusta, Ga. The Circuit Court of Appeals, by its decree, enjoined and restrained the defendants to cease and desist from making any greater charge in the aggregate on freight of the first class carried from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta, and directed defendants to pay \$100 per day for each day that they should fail not to do so, within five days after the entry of the decree. The Supreme Court further held that it was within the jurisdiction of the Commission to consider whether defendants, in charging a higher rate for a shorter than for a longer distance,

were, or were not, transporting property in transit between the States under "substantially similar circumstances and conditions." That the question was one of fact peculiarly within the province of the Commission, whose conclusions were accepted and approved by the Circuit Court of Appeals. That the record disclosed nothing which made it the duty of the Supreme Court of the United States to draw a different conclusion. (March, 1896.) *Cincinnati & New Orleans Railroad v. Interstate Com. Co.*, 162 U. S. 184; *Interstate Com. Co. v. Cincinnati & New Orleans Railroad*, 162 U. S. 184.

**Ocean Competition — Foreign Traffic.**—One of the most interesting and important controversies under the Interstate Commerce Act arose in March, 1889, upon an order made by the Interstate Commerce Commission directing that "imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

The carriers refused to comply with the order, and complaint was made to the Commission by the New York Board of Trade and Transportation, the Commercial Exchange of Philadelphia, and the San Francisco Chamber of Commerce, alleging that the order of the Commission was being violated. That regular tariff rates were charged on property delivered to the carrier at New York and Philadelphia, for transportation to Chicago and other western points. On property delivered to the carrier at New York or Philadelphia from vessels and steamships on bills of lading from London, Liverpool, and other foreign ports for carriage to Chicago and the west, the rates charged were much less, and in some cases more than 50 per cent. less, for a like and contemporaneous service under substantially similar circumstances and conditions. That the railroad companies' share of each through rate was lower than their regular tariff rates.

The Commission, on the pleadings and evidence, made an order directing the carriers to cease and desist from charging more on domestic shipments than was charged for carrying foreign shipments, on through bills of lading, from foreign



ports. The carriers refused to obey the order, and suit was brought by the Commission in the Circuit Court of the United States for the southern district of New York to enforce it.

At circuit, a decree was entered directing defendants to comply with the order of the Commission, which decree was affirmed in the Court of Appeals. On appeal to the Supreme Court of the United States, the decree was reversed (FULLER, C. J., HARLAN and BROWN, JJ., dissenting).

The majority of the Supreme Court held that the similar circumstances and conditions referred to in the Interstate Commerce Act are not circumstances and conditions which are confined necessarily to those operating carrying lines or conducting railway transportation and traffic within the field occupied by the carrier. That under certain circumstances, the Commission should take into consideration competitive conditions arising outside of its jurisdiction entirely. The majority of the court held, broadly, that ocean competition arising beyond the seaboard of the United States should be considered as constituting dissimilar conditions which would justify and excuse a difference in charges in rates between export and domestic traffic. (March, 1896.) *Texas Railway v. Interstate Com. Co.*, 162 U. S. 197.

The San Francisco Chamber of Commerce, which intervened in the case, showed, in addition to the evidence adduced by the New York and Philadelphia merchants, that the Texas Pacific and Southern Pacific railroads carried goods from New Orleans to San Francisco, which had been shipped on through bills of lading from London and Liverpool, for which it charged less rates than it charged for carrying American goods from New Orleans to San Francisco. On this branch of the case it was strongly urged that under the Interstate Commerce Act the carrier was forbidden to charge American shippers more for carrying goods from New Orleans to San Francisco than it charged English shippers for the same service. That the act, in express terms, forbade the carrier to charge one shipper more than another for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic "under substantially similar circumstances and conditions." Defendants claimed that American merchants purchasing goods

in England negotiated through rates from London and Liverpool to San Francisco, and that these rates were governed by the competition of sailing vessels for the entire distance; by steamships and sailing vessels, in connection with railroads, across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these, under through arrangements, to San Francisco. That defendants were obliged to compete for the foreign business, and unless it charged the rates complained of, it would lose the business. That no prejudice resulted to New Orleans for the alleged reason that if defendants could not compete for the business, the traffic would move *via* other routes without benefit to New Orleans, and that compliance with the order would injuriously affect defendant's business to points in Texas, and on the Missouri.

The main question presented was whether the Commission, under the act, could consider ocean competition as constituting dissimilar conditions, or whether the carriers were bound by the act to confine competitive conditions within the field occupied by the carrier, and not competitive conditions arising outside of it, and thus discriminate against American merchants transporting American commodities.

The court ruled that outside competitive conditions, though not in terms referred to in the statute, could be taken into consideration in ascertaining the meaning of the phrase in sections 2 and 4 of the act "under substantially similar circumstances and conditions." This conclusion resulted in a reversal of the decree of the Circuit Court of Appeals. The opinion for reversal was written by Justice SHIRAS, with whom Justices FIELD, GRAY, BREWER, WHITE, and PECKHAM concurred. *Ib.*

**Ocean Competition — Dissenting Opinions.**— In view of the fact that the contention of the shippers, and of the Interstate Commerce Commission in the above case was sustained at circuit, enjoining the carriers from disobeying the order of the Commission, and that this decree was affirmed by the Court of Appeals, second circuit, and that three of the nine justices in the Supreme Court dissented from the conclusions arrived at in the prevailing opinion, the views entertained by a

minority of the court are of interest to shippers and commercial bodies throughout the country. These views sustained the contention not only of the Interstate Commerce Commission, but of Chambers of Commerce and other commercial bodies throughout the country. The questions discussed by the court were questions of law, as they involved the construction and interpretation of an act of Congress. But they also involve questions of economic science upon which widely-diverse opinions are entertained. Mr. Justice HARLAN wrote in support of the views contended for by the shippers, with whom Mr. Justice BROWN concurred. Chief Justice FULLER dissented also from the majority of his brethren on the ground that the "similar circumstances and conditions" referred to in the Interstate Commerce Act were such as arose within the field occupied by the carrier, "and not competitive conditions arising wholly outside of it." The opinion of Mr. Justice HARLAN is, in part, as follows:

"Mr. Justice HARLAN, with whom concurred Mr. Justice BROWN, dissenting.

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"The record shows that the rate in cents per 100 pounds charged for the transportation, on through bills of lading, of books, buttons, carpets, clothing, and hosiery, from Liverpool and London, *via* New Orleans, over the Texas and Pacific Railway and the railroads of the Southern Pacific system, to San Francisco, is 107, while upon the same kind of articles — carried, it may be, *on the same train* — the rate charged from New Orleans, *over the same railroads*, to San Francisco is 288. The rate in cents per 100 pounds charged for the transportation, on through bills of lading, of boots and shoes, cashmeres, cigars, confectionery, cutlery, gloves, hats and caps, laces, linen, linen goods, saddlers' goods, and woollen goods, from Liverpool and London, *via* New Orleans, over the same railroad, to San Francisco, is 107, while upon like goods, starting from New Orleans and destined for San Francisco, over the same line — it may be *on the same train* — the rate charged is 370. Discrimination in the matter of rates is also made by the railway company (though not to so great an extent) in favor of blacking, burlaps, candles, cement, chinaware, cordage, crockery, common drugs, earthenware, common glassware, glycerine, hardware, leather, nails, soap, caustic soda,



tallow, tin plate, and wood pulp, manufactured abroad and shipped, on through bills of lading, from Liverpool and London, via New Orleans, to San Francisco, and against goods of like kind carried from New Orleans to San Francisco over the same railroads.

“These rates have been established by agreement between the railway company whose line, with its connections, extends from New Orleans to San Francisco, and the companies whose vessels run from Liverpool to New Orleans. And the question is presented, whether the Texas and Pacific Railway Company can, consistently with the act of Congress, charge a higher rate for the transportation of goods starting from New Orleans and destined to San Francisco, than for the transportation between the same places, of goods of the same kind in all the elements of bulk, weight, value, and expense of carriage, brought to New Orleans from Liverpool on a through bill of lading, and to be carried to San Francisco. If this question be answered in the affirmative; if all the railroad companies whose lines extend inland from the Atlantic and Pacific seaboards indulge in like practices — and if one may do so, all may and will do so; if such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise, and labor, is consistent with the act of Congress, then the title of that act should have been one to regulate commerce to the injury of American interests and for the benefit of foreign manufacturers and dealers.

“The railway company insists that the competition existing between it and the ocean lines running between Liverpool and San Francisco, *via* Cape Horn and the Pacific ocean, and between Liverpool and San Francisco, *via* the Isthmus of Panama, compel it to charge a higher rate from New Orleans to San Francisco for the transportation of goods originating at New Orleans than on like goods originating at Liverpool and destined to San Francisco, *via* New Orleans; otherwise, it contends, goods that originate at Liverpool would fall into the hands of its competitors in the business of transportation. The Interstate Commerce Commission held that, in determining the question before it, no weight could be attached to the circumstances arising from the conduct of ocean lines by corporations or associations who were in nowise subject to the provisions of the act of Congress; and that the provision which expressly forbids common carriers from making or giving undue preferences or advantages in any respect whatsoever was intended to be so far rigid in its nature that it could not be relaxed by reason of circumstances or conditions arising out of or connected with foreign countries or that were caused by agencies beyond the

control or supervision of the Commission. The court now holds that the Commission erred in thus interpreting the act of Congress.

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"I am unwilling to impute to Congress the purpose to permit a railroad company, because of arrangements it may make, for its benefit, with foreign companies engaged in ocean transportation, to charge for transporting from one point to another point in this country goods of a particular kind manufactured in this country three or four times more than it charges for carrying, over the same route and between the same points, goods of the same kind manufactured abroad and received by such railroad company at one of our ports of entry.

"The fourth section of the statute relating to long and short distances, and which authorizes the Commission, in special cases, to allow less to be charged for longer than for shorter distances for the transportation of passengers or property over the same route, does not refer to distances covered and services performed on the ocean between this country and foreign countries not adjacent to this country, nor to transportation between the same points in this country over the same road. When the question is as to rates for service by a carrier between two given points in this country, and in reference to the same kind of property, Congress, I think, intended that for such 'like and contemporaneous service,' performed, as they necessarily are, under the same circumstances and conditions, no preference or advantage should be given to any particular person, company, firm, corporation, or locality. Consequently, when goods are to be carried from one point in the United States to another, the rate to be charged cannot properly be affected by an inquiry as to where such goods originated or were manufactured.

"Congress intended that all property transported by a carrier subject to the provisions of the act should be carried without any discrimination because of its origin. The rule intended to be established was one of equality in charges, as between a carrier and all shippers, in respect of like and contemporaneous service performed by the carrier over its line, between the same points, without discrimination based upon conditions and circumstances arising out of that carrier's relations with other carriers or companies, especially those who cannot be controlled by the laws of the United States.

"After referring to the fact that goods originating in a foreign country are carried upon rates that are practically fixed abroad, and are not published here, while carriers governed by the act of Congress are required to publish their rates for transportation in this country, the Commission, speaking by Commissioner



Bragg, well said: 'Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which it is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States, under the operation of the act to regulate commerce, must be under the inland tariff from such port of entry to such place of destination covering other like kind of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preferences must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from a port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition under the operation of the act to regulate commerce, which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line.' I concur entirely with the commission when it further declared: 'One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute. Such a deprivation would be so obviously unjust as to shock the general sense of justice of all the people of the country, except the few who would receive the immediate and direct benefit of it.'



"It seems to me that any other interpretation of the act of Congress puts it in the power of railroad companies which have established, or may establish, business arrangements with foreign companies engaged in ocean transportation, to do the grossest injustice to American interests. I find it impossible to believe that Congress intended that freight, originating in Europe or Asia and transported by an American railway from an American port to another part of the United States, could be given advantages in the matter of rates, for services performed in this country, which are denied to like freight originating in this country and passing over the same line of railroad between the same points. To say that Congress so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations. Such a result will necessarily follow from any interpretation of the act that enables a railroad company to exact greater compensation for the transportation from an American port of entry, of merchandise originating in this country, than is exacted for the transportation over the same route of exactly the same kind of merchandise brought to that port from Europe or Asia, on a through bill of lading, under an arrangement with an ocean transportation company. Under such an interpretation, the rule established by Congress to secure the public against unjust discrimination by carriers subject to the provisions of the Interstate Commerce Act would be displaced by a rule practically established in foreign countries by foreign companies, acting in combination with American railroad corporations seeking, as might well be expected, to increase their profits, regardless of the interests of the public or of individuals.

"I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under an arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendant's railroad. The consumers at San Francisco, or those who may be supplied from that city, have no concern whether the goods reach them by way of railroad from New Orleans, or by water around Cape Horn, or by the route across the Isthmus of Panama.

"Nor is the question before the court controlled by considerations arising out of the tariff enactments of Congress. The question is one of unjust discrimination by an American railway against shippers and owners of goods and merchandise originating in this country, and of favoritism to shippers and owners of goods and merchandise originating in foreign countries. If

the position of the Texas and Pacific Railway Company be sustained, then all the railroads of the country that extend inland from either the Atlantic or the Pacific ocean will follow their example, with the inevitable result that the goods and products of foreign countries, because alone of their foreign origin and the low rates of ocean transportation, will be transported inland from the points where they reach this country at rates so much lower than is accorded to American goods and products, that the owners of foreign goods and products may control the markets of this country to the serious detriment of vast interests that have grown up here, and in the protection of which, against unjust discrimination, all of our people are deeply concerned.

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“Undoubtedly, the carrier is entitled to reasonable compensation for the service it performs. But the necessity that a named carrier shall secure a particular kind of business is not a sufficient reason for permitting it to discriminate unjustly against American shippers by denying to them advantages granted to foreign shippers. Congress has not legislated upon such a theory. It has not said that the inquiry, whether the carrier has been guilty of unjust discrimination, shall depend upon the financial necessities of the carrier. On the contrary, its purpose was to correct the evils that had arisen from unjust discrimination made by carriers engaged in interstate commerce. It has not, I think, declared nor can I suppose it will ever distinctly declare that an American railway company, in order to secure for itself a particular business and realize a profit therefrom, may burden interstate commerce in articles originating in this country, by imposing higher rates for the transportation of such articles from one point to another point in the United States, than it charges for the transportation between the same points, under the same circumstances and conditions, of like articles originating in Europe, and received by such company on a through bill of lading issued abroad. *Does any one suppose that, if the interstate commerce bill, as originally presented, had declared, in express terms, that an American railroad company might charge more for the transportation of American freight, between two given places in this country, than it charged for foreign freight, between the same points, that a single legislator would have sanctioned it by his vote? Does any one suppose that an American president would have approved such legislation?*

“Suppose the interstate commerce bill, as originally reported, or when put upon its passage, had contained this clause: ‘Provided, however, the carrier may charge less for transporting from an American port to any place in the United States, freight received by it from Europe on a through bill of lading, than it



charges for American freight carried from that port to the same place for which the foreign freight is destined.' No one would expect such a bill to pass an American Congress. If not, we should declare that Congress never intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted.

"Let us suppose the case of two lots of freight being at New Orleans, both destined for San Francisco over the Texas and Pacific railway and its connecting lines. One lot consists of goods manufactured in this country; the other, of goods of like kind manufactured in Europe, and which came from Europe on a through bill of lading. Let us suppose, also, the case of two passengers being at New Orleans — the act of Congress applies equally to passengers and freight — both destined for San Francisco over the same railroad and its connecting lines. One is an American; the other, a foreigner who came from Europe upon an ocean steamer belonging to a foreign company that had an arrangement with the Texas and Pacific Railway Company, by which a passenger, with a through ticket from Liverpool, would be charged less for transportation from New Orleans to San Francisco than it charged an American going from New Orleans to San Francisco. The contention of the railroad company is, that it may carry European freight and passengers, between two given points in this country, at lower rates than it exacts for carrying American freight and passengers between the same points, and yet not violate the statute, which declares it to be unjust discrimination for any carrier, directly or indirectly, by any device, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. And that discrimination is justified upon the ground that, otherwise, the railroad company will lose a particular traffic. Under existing legislation, such an interpretation of the act of Congress enables the great railroad corporations of this country to place American travelers, in their own country, as well as American interests of incalculable value, at the mercy of foreign capital and foreign combinations — a result never contemplated by the legislative branch of the government.

"I cannot accept this view, and, therefore, dissent from the opinion and judgment of the court.

"I am authorized by Mr. Justice BROWN to say that he concurs in this opinion."



Mr. Chief Justice FULLER dissenting:

"In my judgment the second and third sections of the Interstate Commerce Act are rigid rules of action, binding the Commission as well as the railway companies. The similar circumstances and conditions referred to in the act are those under which the traffic of the railways is conducted, and the competitive conditions which may be taken into consideration by the Commission are the competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside of it.

"I am, therefore, constrained to dissent from the opinion and judgment of the court."

**Excessive Charges not Justified to Enable Carrier to Pay Expenses.**— A trunk line of railroad frequently finds it expedient to construct divisions and branch lines to occupy and preempt certain territory, and forestall possible action by a rival carrier. It frequently happens that branch roads, considered as branches, do not pay expenses. This fact cannot justify unjust and unreasonable rates or undue discrimination in rates. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

Defendants sought to justify excessive rates on the sole ground that the branch did not pay, and defendants desired to use it to build up a rival port at Pensacola at the expense of a port at Savannah. The court *held*, that the carrier had no right to fix rates which were actually prohibitory to traffic in one direction without regard to the wishes of the shippers, or the fair opportunity of a community thus prejudiced to promote its commercial prosperity. Discrimination made for the purpose of promoting the interests of the carrier are subservient to the interests of the public and the principles of justice sought to be obtained by the Interstate Commerce Act. While the carrier has a right to exact a fair return for the public utilities it affords, the public interest requires that no more shall be paid by the public for the use of such utilities than the services rendered are reasonably worth. Where there is an irreconcilable conflict between the interest of the carrier and the interest of the public, the latter must prevail. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

"It cannot be admitted," says HARLAN, J., "that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interest and ignore the rights of the public." *Smyth v. Ames*, 169 U. S. 544.

"The public cannot properly be subjected to unreasonable rates in order simply that the stockholders may earn dividends. \* \* \* If a corporation cannot maintain such a highway and earn dividends for stockholders, it is unfortunate for it, and the misfortune is one which the Constitution does not require to be remedied by imposing unjust burdens upon the public." *Railroad Company v. Sandford*, 164 U. S. 567.

**Evidence — Comparison of Rates, not Sufficient.**— A finding by the Commission in a long-and-short-haul case, that rates to a particular point (Hampton, Fla.), are *per se* unreasonable, cannot be sustained on evidence based merely on the fact that such rates are too high as compared with rates from the same initial points (St. Louis, Nashville, and Chattanooga), to Palatka and Jacksonville, Fla., points other than the terminal point complained of, to-wit, Hampton, Fla., a shorter distance. *Interstate Com. Co. v. Nashville Railroad*, 120 Fed. Rep. 934, affirming court below (February, 1903, C. C. A., 5th Circuit).

The court said in above case: "It is charged as a duty of the Georgia, Florida and Southern railroad, the terminal carrier, to make such rates to Hampton and Palatka as will enable the Hampton merchants to compete in Palatka with Palatka merchants dealing in western goods, but it must not be forgotten that the rates to Palatka, which is a competitive point, are made by other carriers with through lines, who are not parties to this suit. The fallacy involved is that Hampton, which is an inland place with no natural advantages, shall be put upon the same footing as Palatka, which is situated upon a navigable stream all the year round, and has, in addition, several through railroad connections. *Ib.*

**Joint Traffic Defined — Connecting Lines, Long and Short Haul.**— A shipper sued the carrier in an action at law to recover damages for being charged more for a short haul than was charged other shippers for a long haul to the same point

of destination. He claimed that the charge was unlawful under the fourth section of the act. Plaintiff had a verdict which was reversed for errors of law. (October, 1892, C. C. A.) *Chicago Railroad v. Osborne*, 52 Fed. Rep. 912.

In its opinion the Court of Appeals held that the Circuit Court erred in its interpretation of the long-and-short-haul clause as affecting joint or through rates on connecting lines. The court observed that where two companies own connecting lines and unite in making a joint through tariff, they form for the connecting roads practically a new and independent line. But such joint rate is not compulsory, and if roads do not choose to make such through rates, they cannot be compelled to do so, but each may insist on charging its local rate for all transportation over its line. But if a joint tariff is agreed upon, it does not form the basis by which the reasonableness of the local tariff of either line is determined. The court then proceeds to illustrate this proposition in regard to the "long-and-short-haul" clause under section 4, using Buffalo and Cleveland for the purpose. "We do not mean to intimate," said the court, "that the two companies with a joint line can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when two companies, by their joint tariff, make a new and independent line, that new line may become subject to the long-and-short-haul clause. What we decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned." *Chicago Railroad v. Osborne*, 52 Fed. Rep. 912.

A joint tariff does not bind road to road, in the sense that the two are used or operated by either corporation.

There is neither unity of ownership nor unity of operation, but only a singleness of charge and a continuity of transportation over connecting roads. *Ib.*

See also *Tozer v. United States*, 52 Fed. Rep. 917.

**Cartage, when not a Terminal Charge.**— Cartage is not, as a rule, a terminal charge. Free cartage furnished to shippers in one locality and not in another is not necessarily a violation



of section 4 of the Interstate Commerce Act unless treated as a terminal charge and published as such in its schedules, or directed to be so published by an order of the Interstate Commerce Commission. *Interstate Com. Co. v. Detroit Railway*, 167 U. S. 633.

**Long and Short Haul — Mode of Fixing Rates.**—After a full hearing and investigation, the Interstate Commerce Commission made an order directing the defendant carriers to cease and desist from enforcing certain rates, charging more for a short than for a long haul, the points being from Cincinnati to Chattanooga, Atlanta, and intermediate points. The carriers refused to obey the order, and the Commission brought suit in the Circuit Court to secure an injunction to restrain the carriers from enforcing the rates which the Commission found to be unlawful. The court dismissed the bill. The Court of Appeals affirmed the decree.

The court observed "in fixing the rates to these intermediate points, the through rate to that competitive point which, combined with the local rate from the competitive point to the point of destination, will give the lowest through rate to the noncompetitive point controls. As the noncompetitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points, and as the carriage of the competitive traffic to the respective points is remunerative to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the noncompetitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate making."

The Supreme Court *held*, however, that an error of law had been committed in the interpretation given by the Commission in making its order as to the rule laid down in *Louisville Railroad v. Behlmer*, 175 U. S. 648. In respect to this rule, the court *held*, that when a violation of the long-and-short-haul clause of the Interstate Commerce Act is charged, competition is one of the elements which enter into the determination as to whether or not the conditions are similar. If a dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.

For these reasons the Supreme Court modified the decree of the Court of Appeals (reported in 93 Fed. Rep. 83), and directed that the dismissal of the bills be modified without prejudice to the right of the Interstate Commerce Commission, if it so elects to make an original investigation of the questions contained in the record pertinent to the complaints presented by that body, and as modified decree affirmed. *Interstate Com. Co. v. Western Railroad*, 181 U. S. 29; *Interstate Com. Co. v. Clyde SS. Co.*, 181 U. S. 29.

**Carrier Need not Apply to Commission to Fix Rates.**—A carrier in making a tariff rate may judge in the first instance as to whether, in prescribing a greater charge for a short than for a long haul, the circumstances and conditions are or are not “substantially similar.” He is not obliged to seek an investigation by the Interstate Commerce Commission as to whether circumstances and conditions justify the rate. But in fixing the rate, the carrier does so at its peril subject to liability under the act if it should be afterward adjudicated that the charge so fixed is unlawful. *Interstate Com. Co. v. Atcheson*, 50 Fed. Rep. 295.

**Damages — Long and Short Haul.**— A shipper who is injured by reason of the fact that he was not given the same rate for the shorter haul than was charged other shippers for the longer haul may bring an action at law against the carrier. If he is entitled to recover the measure of damages will be the difference between the amount which plaintiff was obliged to pay and the lesser rate shown to have been paid by other shippers for like services. (June, 1891, Cir. Ct. So. Dist. Iowa.) *Junod v. Chicago Railroad*, 47 Fed. Rep. 290.

Plaintiff claimed that he was charged more by defendant for carrying grain to Chicago from Carroll, Iowa, than was charged by defendant to shippers transporting grain from Blair, Neb., to Chicago. It was alleged that plaintiff was obliged to pay 19 cents per 100 pounds from Carroll to Chicago, while shippers in Blair, Neb., were charged for the same service 11 cents per 100 on grain shipped by them to Chicago. That the distance from Blair to Chicago is much farther than from Carroll to Chicago. The court charged the jury that if they

found a verdict for plaintiff they might, in their discretion, add interest, but the interest must be computed from the date of the last shipment made by plaintiff. *Ib.*

**§ 5. Pools and Combinations Prohibited.**—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

**Object and Scope of Section 5.**— The object of this section of the act is to prevent agreements among carriers which will operate to shut out competition. Competing lines of carriers throughout the country are forbidden to combine their business, and divide the profits of the pool among themselves. If such combinations were permitted, it is claimed the shipper and consumer would be practically at the mercy of one carrier operating the various connecting lines of railroad as constituent companies in the common interest. Such a merger or combination would operate to destroy competition and restrain trade and commerce to such an extent that commerce would be practically controlled by the carrier, who could, through secret agencies, also become the producer and shipper. Notwithstanding the stringent provisions of section 5, combinations in restraint of trade became so formidable that on July 2, 1890, Congress passed the Sherman Act, entitled “An Act to protect trade and commerce against unlawful restraints and monopolies.” The provisions of the act were made universal in their application to reach the heart of the evil sought to be remedied. It declares that “every contract” in restraint of trade or commerce is unlawful. It is immaterial, therefore, whether such



a contract, if it affects interstate commerce, is made with the carrier, shipper, manufacturer, or producer. The contract, if it restrains trade and commerce, is unlawful. The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of section 5 so as to embrace not only carriers, but manufacturers and producers as well.

The Interstate Commerce Act and the Sherman Act are not repugnant to each other. The Supreme Court of the United States has held that both acts must stand (October, 1898, *United States v. Joint Traffic Association*, 171 U. S. 505), and must be construed as harmonious legislation. *Merger Cases* — *Northern Securities Company v. United States*, 193 U. S. 197. (March, 1904.)

**Pooling Defined.**— The statute contemplates two methods of pooling, both of which are prohibited. First, a physical pool, which means a distribution of property by the carrier offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon; and secondly, a money pool, which is described best in the language of the statute “to divide between them [different and competing railroads] the aggregate or net proceeds of the earnings of such railroads or any portion thereof.” The words “any common carrier,” as used in the act, means carriers engaged in interstate commerce. *In re Pooling Freights*, 115 Fed. Rep. 588 (May, 1902, Dist. Ct. West. Dist. Tenn.).

**Pooling Agreements Unlawful.**— Congress has power, in legislating upon interstate commerce, to declare that no contract, agreement, or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. *United States v. Joint Traffic Assn.*, 171 U. S. 505; *United States v. Trans-Missouri Freight Assn.*, 116 U. S. 290; *Northern Securities Company v. United States*, 193 U. S. 197.

In the *Joint Traffic* cases it appeared that thirty-one railroad companies, engaged in interstate commerce between Chicago and the Atlantic coast, made a joint traffic agreement, and entered into articles of association with respect to the regulation of

rates, fares, and charges, and the rules applicable thereto, governing competitive traffic (with certain specific exceptions) which passed through the western *termini* of the trunk lines of the respective roads operated by the members of the association, and such other points as might be thereafter designated by the managers. The agreement was drawn for the purpose of avoiding the objections to the validity of a similar agreement, which was declared void by the court in the *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

The agreement declared expressly that it was made to aid in fulfilling the purposes of the Interstate Commerce Act, and to co-operate with the respective parties and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on State and interstate traffic; to prevent unjust discrimination, and to secure the reduction and contraction of agencies, and the introduction of economies in the conduct of freight and passenger service.

A bill was filed on behalf of the United States in the southern district of New York for the purpose of obtaining an adjudication that the agreement in question was unlawful in restraint of trade, and in violation of the provisions of the Interstate Commerce Act, and of the Sherman Act, and to restrain and enjoin its further execution. The government claimed that although the agreement professed in terms to aid and fulfil the purposes of the Interstate Commerce Act, yet its direct and immediate results would operate to defeat the object and purposes of the act, create a monopoly, and stifle competition; that it was in direct violation of section 5 of the act, which in terms forbids common carriers to pool freights of different and competing roads, or to divide the aggregate net proceeds of the earnings of such roads, or any portion thereof, and making such pooling agreements an offense under the act. The court below dismissed the bill and its judgment was affirmed in the Circuit Court of Appeals. The judgment was reversed in the Supreme Court and the case remanded for further proceedings. The Supreme Court held that there was no legal distinction between the agreement of the Joint Traffic Association, then before the court, and the agreement in the *Trans-Missouri* case. That the agreement was in restraint of trade and commerce and was

clearly in violation of the provisions of the Sherman Act (October, 1898). *United States v. Joint Traffic Assn.*, 171 U. S. 505.

The court observed, among other things in pointing out the illegality of the agreement, that under it the managers of the association may from time to time recommend changes in rates and a failure to observe the recommendation would be a violation of the agreement and would subject the offender to a fine not exceeding \$5,000. If one member should be allowed to fix its own rates and be guided by them, as to that company the agreement might as well be rescinded. No such result was contemplated. In order to prevent not only secret competition, but to prevent any competition at all, provision is made for prompt action by the managers of the association, under which the latter is given power to enforce uniformity of rates against the offending company, upon pain of an open, rigorous, and relentless war of competition against it on the part of the whole association. *Ib.*

The natural, direct, and immediate effect of competition is to lower rates and to thereby increase the demand for commodities, the supplying of which increases commerce. And an agreement whose first and direct effect is to prevent this play of competition restrains instead of promotes trade and commerce. *Ib.*

The agreement entered into by the combination known as the Trans-Missouri Freight Association made no provision for pooling freights or dividing the aggregate net proceeds. It was an agreement to fix and maintain uniform rates among competing lines engaged in interstate commerce, with penalties to be imposed upon its members for a violation of its rules. The court held that, as there was no agreement to pool freights or divide the aggregate net proceeds, the agreement complained of was not one forbidden by the Interstate Commerce Act or by section 5 of that act forbidding such pooling arrangements, but that the agreement being one to prevent competition and furnish rate cutting it was in violation of the Sherman Anti-Trust Act. (Act approved July 2, 1890.) *United States v. Freight Assn.*, 166 U. S. 290 (March, 1897).

The court held further, that the Sherman Act embraced every contract or conspiracy in restraint of interstate trade or commerce, whether made by common carriers engaged in transportation or by persons or corporations engaged in the manufacture,



purchase, and sale of commodities. The court held further that if it appeared that the contract or combination complained of was in restraint of interstate or foreign commerce it was condemned by the statute without regard to whether such agreement or combination was or was not reasonable. *Ib.*

**Status of the Court in the Freight Cases.**— In both of the cases above referred to the court was not unanimous. In both the prevailing opinion was written by Mr. Justice PECKHAM. The earlier (the *Trans-Missouri* case) was argued December 8, 1896, and decided March 22, 1897. Chief Justice FULLER and Justices BREWER, BROWN, and HARLAN concurred with PECKHAM, J. Justices WHITE, FIELD, GRAY, and SHIRAS dissented.

In the later case of the Joint Traffic Association, which was argued February 24, 1898, and decided October 24, 1898, Chief Justice FULLER and Justices BREWER, BROWN, and HARLAN, concurred with PECKHAM, J. Justices SHIRAS, WHITE, and GRAY dissented. Justice McKENNA took no part.

In the *Addystone Pipe* case (argued in April 26, 1899; decided, December 4, 1899), which did not relate to railroads but to manufacturers and dealers in pipe in which it was held that the agreement or combination was unlawful as in restraint of interstate commerce and in violation of the provisions of the Sherman Act, the decision was unanimous. The opinion of the court was written by Mr. Justice PECKHAM.

**The Merger Case — Status of the Court.**—The case of the *Northern Securities Company v. The United States* (193 U. S. 197), was decided March 14, 1904. It was brought under the Sherman Act to dissolve the securities company to which had been assigned, as a holding company, the stock of two corporations operating parallel competing lines of railroad under an agreement to permit the holding company, which did not own or operate a railroad, to control the operations of both competing lines. It was argued that the agreement was in restraint of trade and commerce and of the Constitution and statutes of States which created the merged corporations. The merger agreement was held to be illegal and in violation of the provisions of the Sherman Act. The court divided. The prevailing opinion was written by

Justice HARLAN, with whom Justices BROWN, DAY, and McKENNA concurred. Mr. Justice BREWER concurred in the result in an opinion in which he doubted whether *every* agreement in restraint of trade and commerce could be held to be illegal. Chief Justice FULLER and Justices WHITE, HOLMES, and PECKHAM dissented.

For a fuller review of these cases, see *post*, under section 1 of the Sherman Act.

**Pooling — Contracts Relating to must be Produced — Coal Trust.**— A proceeding was instituted before the Interstate Commerce Commission charging certain carriers engaged in the transportation of coal from mines in Pennsylvania to tide water and to different States. The allegations in the complaint were in substance that six railroad companies engaged in carrying coal were substantially parallel competing lines. That they entered into an agreement and combination to pool their freight traffic in anthracite, so as to divide the same between their different lines in agreed proportions in violation of section 5 of the act, and pooled their freight under the agreement.

In the course of the investigation the carriers and their agents were called upon to produce the contracts in evidence. The carriers refused on many grounds, among others that the evidence contained in the contracts might tend to incriminate the contracting parties. The Circuit Court sustained the objection solely on the ground that the contracts related only to the sale of coal in Pennsylvania, which was not a transaction embracing interstate commerce.

On appeal to the United States Supreme Court the lower court was reversed, the contracts were held to be relevant, and that the contracts must be marked in evidence.

Mr. Justice DAY, on this point, said: "It is argued that these contracts if given in evidence will tend to show a pooling of freights in violation of the fifth section of the Commerce Act. While this testimony may not establish such an agreement as is suggested it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads where by agreement or otherwise the companies have a common interest in the source from which it is obtained."

The court held also that the contracts were competent on the question as to the mode of fixing rates. "To unreasonably hamper the Commission by narrowing the field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purpose for which it was established by Congress." (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

**Pooling a Defense to an Equity Suit against Ticket Scalpers.**

— The carrier sued a number of defendants engaged as ticket brokers who sold tickets issued by complainant in conjunction with other carriers at cut rates. The relief asked was an injunction to restrain defendants from selling the tickets. They were known as round-trip excursion tickets to the Pan-American Exposition, held at Buffalo in 1901. The defendants purchased these tickets at Buffalo and sold the unused return portions at reduced prices. The tickets were originally issued at special rates and were non-transferrable by the original purchaser.

Defendants pleaded that he who comes into equity must come with clean hands. That complainants in issuing the tickets originally did so under an agreement and combination with other carriers to create a monopoly in the sale of such tickets and to stifle competition, and bar all competitors not members of the associations under which complainant acted and of which it was a member, to-wit, the Trunk Line Association, also to subordinate bodies as the Trunk Line Committee acting through the Trunk Line Passenger Committee. It was charged that under the agreement its members made a *pro rata* division of all receipts, and that it was not only a pooling agreement forbidden by section 5 of the Interstate Commerce Act, but that it was also in violation of the Sherman Act.

The court sustained the defense and vacated the temporary injunction on the ground that as the act of complainant in issuing such tickets was unlawful and was the result of an agreement forbidden by statute, complainant could not invoke the aid of a court of equity to sustain it in the prosecution of such an unlawful agreement. *Delaware Railroad v. Frank*, 110 Fed. Rep. 689 (August, 1901, Cir. Ct. No. Dist. N. Y.).



§ 6. **Schedule of Rates to be Published.**— That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected.

**Rates through Foreign Country.**— Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any

freight shipped from the United States, through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

**Notice of Advance or Reduction of Rates.**—No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

**Published Rate Only Legal Rate.**—And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than

is specified in such published schedule of rates, fares, and charges as may at the time be in force.

**Documents to be Filed with Commission — Measure of Publicity.**— Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

**Notice of Advance or Reduction of Joint Rates — Commission may Publish Rates.**— No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, ex-



cept after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

**Deviation from Published Rate Unlawful.**— It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

**Form of Schedules.**— The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient.

**Penalties for Failure to Publish Rates.**— If any such common carrier shall neglect or refuse to file or publish its

schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act. (*As amended March 2, 1889.*)

**§ 6. Supplemented by Elkins' Act of February 19, 1903.**— The matters embraced in section 6 of the Interstate Commerce Act was supplemented by an act of Congress, approved February

19, 1903, entitled "An Act to further regulate commerce with Foreign Nations and Among the States." The supplemental provisions of this statute, known as the Elkins Act, are as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, [**Violation of Act a Misdemeanor**] would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts [**Penalty for Violation of Published Rate**] to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation [**Soliciting or Paying Rebate, Misdemeanor**] to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier sub-



ject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, [**Imprisonment Abolished**] imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States [**Jurisdiction of Federal Court**] having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

**Act of Officer or Agent, Act of Carrier.**— In construing and enforcing the provisions of this section the act, omis-

sion, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

**Published Rate when Conclusive — Parties.**— § 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

**Adherence to Rate, how Enforced.**— § 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic

between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several [**U. S. District Attorney Must Prosecute at Request of Attorney-General**] district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and



eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person [Immunity of Witnesses] shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions [Expedition under Act of February 11, 1903] of an Act entitled “An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled ‘An Act to protect trade and commerce against unlawful restraints and monopolies,’ ‘An Act to regulate commerce,’ approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,” shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

**Repealer.**— § 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed,

but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

§ 5. That this Act shall take effect from its passage.

**Object and Scope of Section 6.**— This section was designed to compel publicity on the part of the carrier as to all rates, fares, schedules, and tariffs charged by the carrier alone or in connection with other carriers, under a common arrangement for joint through rates over connecting lines. It may be designated as the publicity section of the act and is of the greatest importance to secure the protection and rights of all shippers. In the absence of the compulsory requirements of section 6 the shipper and the traveling public would be remediless in their efforts to secure uniform rates by reason of the difficulty which would arise in securing evidence of acts of discrimination in violation of the statute. Congress, by the provisions of section 6, designed that the carrier should have but one schedule of rates and tariffs which should be published and made easily accessible to every shipper and every person desirous of being transported on any line from a point in one State to his destination in another State. The published rate is the only lawful rate and the carrier can make no charge except such as is published. If it exacts less, or if it exacts more, the charge is unlawful and subjects the carrier to the pains and penalties of the act.

Failure to comply with the provisions of this section (as well as other requirements in other parts of the act) is punishable criminally, as prescribed in section 10 as amended by the Elkins Act, approved February 19, 1903.

**The Elkins Act.**— The act of February 19, 1903, known as the Elkins Act, supplements the provisions of section 6 and has been inserted here as part of that section. This supplemental legislation deals principally with the matters embraced in section 6 with respect to the publicity of tariff rates and charges. It relates also to the subject of rebates, drawbacks, and unjust discrimination, which practices are declared unlawful by sec-

tion 2 known as the anti-rebate section. Section 2 declares that it shall be unlawful for the carrier to receive or collect from any person a greater or less compensation than it charges or collects from any other persons for a like service. The Elkins Act declares that it shall be unlawful for the carrier or any person or persons or corporation "to offer, grant, or give or to solicit, accept, or receive any rebate." It is claimed that under the Elkins Act this language makes the shipper or person who solicits the rebate liable with the carrier who gives it.

As to the mode of proving that such rebate was given the published rate is deemed the legal rate and is conclusive evidence against the carrier. Proof that there has been a departure from the published rate "or any offer to depart therefrom" constitutes the offense of unjust discrimination. It will be observed that in order to make out a case it is no longer necessary to prove that the published rate has actually been departed from, or that the rebate or drawback has actually been paid or allowed to the shipper. It will be sufficient to show that the carrier "effered to depart" from the published rate, and proof of such "offer" will constitute a *prima facie* case under the statute. The Elkins Act in express terms makes the carrier corporation liable under the act as well as the officers, agents, and servants of the corporation.

Another important change wrought by the Elkins Act relates to the punishment prescribed by it and by the Interstate Commerce Act. Prior to its enactment the punishment incurred for a violation of the Interstate Commerce Act included both fine and imprisonment. The imprisonment feature has been eliminated and abolished by the Elkins Act. The maximum fine for unjust discrimination prescribed by the new law is \$20,000 and the minimum fine, \$1,000. Imprisonment can now be imposed only where the offender is adjudged guilty of a contempt of court for failure to comply with the provisions of a writ of *mandamus*, which may be issued to compel the carrier to comply with the provisions of section 6. The section declares expressly that failure to comply with the writ shall be punished as a contempt of court. This remedy is cumulative and is not affected by the pendency of criminal proceedings.

The Elkins Act also makes clear the jurisdiction in which in-



dictments may be found against persons proceeded against criminally for any violation of the Commerce Act, or of the Elkins Act, by declaring that such violation may be prosecuted "within the district in which such violation was committed, or through which the transportation may have been conducted." If an offense is begun in one district and completed in another, it may be dealt with in either jurisdiction.

A remedy by injunction is also provided to restrain carriers from receiving or transporting persons or property under section 1 until the provisions of section 6 have been complied with.

**Mandamus to Compel Publication of Rates — Common Arrangement Defined.**— Where carriers agree among themselves to transport property from one State to another over a number of lines, at a fixed through rate, and agree expressly or by implication to a division of the charges among the carriers, such an arrangement constitutes "a common arrangement for a continuous carriage or shipment," within the meaning of section 1 of the act. The terms of such an arrangement must be made public, and published pursuant to the provisions of section 6 and the performance of the requirements of that section may be enforced by a writ of mandamus issued by a Circuit Court of the United States as prescribed in section 6. *United States ex rel. Interstate Com. Co. v. Seaboard Railroad*, 82 Fed. Rep. 563 (July, 1897, Cir. Ct. So. Dist. Ala.).

**Criminal Offense — Deviation from Published Rate, Liability of Receiver.**— A violation of the provisions of section 6 of the act with respect to deviating from published joint tariff rates by suffering or permitting persons to obtain transportation for less than published rates is made a misdemeanor by section 10 of the act. Prior to February 19, 1903, the punishment prescribed was both fine and imprisonment. By the act of February 19, 1903, the fine was increased and so much of the statute as related to imprisonment was abolished.

An indictment against a receiver of a railroad for violating the provisions of section 6 with regard to deviating from published joint tariff rates was demurred to on the ground that a receiver, although included by the language of section 10, could not be held under an indictment charging a violation of section

6 for a deviation from a joint tariff rate, unless it was averred that the receiver, subsequent to his appointment, became a party to the tariff agreement or ratified, adopted, or recognized it in some way. The court sustained the demurrer on the ground that no person can be convicted of a crime in failing to keep an agreement unless he is under some obligation to keep it and to which he was not a party. *United States v. De Coursey*, 82 Fed. Rep. 302 (August, 1897, Dist. Ct. No. Dist. N. Y.).

See also *United States v. Tozier*, 39 Fed. Rep. 369 (June, 1889, Dist. Ct. East. Dist. Mo., N. D.); *Same v. Same*, 39 Fed. Rep. 904 (September, 1889, Dist. Ct. East. Dist. Mo. N. D.).

**Penalties — Imprisonment Abolished.**— The penalties for a violation of section 6 are provided for in section 10 of the act, except that section 6 specifically declares that *in addition* to other penalties prescribed, a common carrier, who neglects or refuses to file or publish a schedule of the tariffs of rates, fares, and charges in accordance with section 6, shall be subject to a writ of *mandamus* to be issued by any Circuit Court of the United States in the judicial district where the principal office of the common carrier is situated or where the violation of the act was committed. The *additional* penalty attaches in case the writ is not obeyed by the carrier, who may then be punished as for a contempt of court, which would subject the offender to imprisonment until he purged himself of the contempt. The evident intention of Congress was that in case criminal proceedings were instituted against the carrier, all the civil remedies in favor of shippers should remain in full force and virtue, notwithstanding the pendency of such criminal proceedings.

Prior to the 19th day of February, 1903, a violation of the provisions of section 6 was punishable under section 10 by a fine not to exceed \$5,000, except when the offense charged was unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, in which case the offender was liable *in addition* to the fine to be imprisoned in the penitentiary for a term not exceeding two years or both such fine and imprisonment. On the 19th day of February, 1903, the Elkins Act was approved and became operative. Under and by virtue of this law, which supplements section 6 of the Interstate

Commerce Act, the carrier corporation becomes liable for a violation of the provisions of section 6 as well as any officer of the corporation. The penalty prescribed for willful failure to publish tariff rates and charges, is declared to be a fine of not less than \$1,000 or more than \$20,000 for each offense. The Elkins Act also abolishes imprisonment as a penalty for a violation of any of the provisions of the Interstate Commerce Act, and declares that in all convictions under the act, whether committed before or after the passage of the Elkins Act, no penalty shall be imposed on the convicted party, other than the fine prescribed by law, "imprisonment wherever now prescribed as part of the penalty being hereby abolished."

There has been considerable discussion as to the wisdom of abolishing the penalty of imprisonment for violations of the Interstate Commerce Act. It seems clear that the fine imposed by the Elkins Act, for failure to comply with the provisions of section 6, which may be as great as \$20,000 for each offense, has not served to deter carriers from violating the spirit and letter of the law. The Interstate Commerce Commission, in its annual report for the year 1903, gives a schedule of litigation pending against carriers for violations of the act. This schedule comprises some thirty cases remaining undisposed of on December 15, 1903. Of these one-half were brought to enjoin carriers from departing from the published tariff rates. In other words the list shows that fifteen actions and proceedings of a civil nature were pending in December, 1903, nearly ten months after the Elkins Act went into effect, to compel common carriers to comply with the provisions of section 6. This list is as follows:

Brewer et al. v. Louisville & Nashville Railroad Company et al. Griffin, Ga., long and short-haul case. United States Circuit Court, southern district of Georgia.

Interstate Commerce Commission v. Northern Pacific Railroad Company et al. Fargo, N. D., long and short-haul case. United States Circuit Court, district of North Dakota.

Interstate Commerce Commission v. Western New York & Pennsylvania Railroad Company et al. Discriminating rates on petroleum oil. United States Circuit Court, western district of Pennsylvania.



Interstate Commerce Commission v. Nashville, Chattanooga & St. Louis Railway Company et al. Hampton, long and short-haul case. United States Supreme Court.

Interstate Commerce Commission v. Southern Pacific Company et al. Kearney, long and short-haul case. United States Circuit Court, northern district of California. Argued and submitted March 16 and 17, 1903.

Interstate Commerce Commission v. Southern Railway Company. Danville, long and short-haul case. United States Supreme Court.

Interstate Commerce Commission v. Southern Pacific Company et al. California orange case. United States Circuit Court, southern division of the southern district of California.

Interstate Commerce Commission v. Lake Shore & Michigan Southern Railway Company et al. Hay case. United States Circuit Court, northern district of Ohio.

Interstate Commerce Commission v. Louisville & Nashville Railroad Company. Contempt proceedings against Milton H. Smith, president Louisville & Nashville Railroad Company; W. Hale, superintendent (fourth division) Seaboard Air Line Railway, and W. B. Denham, superintendent (second division) Atlantic Coast Line Railroad Company, for violating injunction decree. United States Circuit Court, southern district of Georgia.

United States v. Chicago & Northwestern Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Illinois Central Railroad Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Michigan Central Railroad Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Pennsylvania Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Lake Shore & Michigan Southern Railway Company. *Proceeding to enjoin departure from published tariff*

rates. Temporary injunction granted. United States Circuit Court, northern district of Illinois.

United States v. Wabash Railroad Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Atchinson, Topeka & Santa Fe Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago, Rock Island & Pacific Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago, Burlington & Quincy Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago, Milwaukee & St. Paul Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago & Alton Railroad Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chicago Great Western Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Missouri Pacific Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Missouri.

United States v. Chesapeake & Ohio Railway Company. *Proceeding to enjoin departure from published tariff rates.* Temporary injunction granted. United States Circuit Court, western district of Virginia.

United States v. J. E. Geddes, receiver Ohio River & Western Railroad Company. Action to recover penalty under section 6, Safety-Appliance Act of March 2, 1893, as amended April 1, 1896. United States Circuit Court of Appeals, sixth circuit.

United States ex rel. Martin A. Knapp et al. v. Boston & Maine Railroad Company. Petition for mandamus to compel

filing of annual report. United States Circuit Court, district of Massachusetts.

United States ex rel. Martin A. Knapp et al. v. Lake Shore & Michigan Southern Railway Company. Petition for mandamus to compel filing of annual report. United States Circuit Court, northern district of Ohio.

United States ex rel. Martin A. Knapp et al. v. New York Central & Hudson River Railroad Company. Petition for mandamus to compel filing of annual report. United States Circuit Court, southern district of New York.

United States ex rel. Martin A. Knapp et al. v. Delaware & Hudson Company. Petition for mandamus to compel filing of annual report. United States Circuit Court, southern district of New York.

W. O. Johnson v. Southern Pacific Company. Damages on account of personal injury, but involving also construction of the Safety-Appliance Law. Intervention by United States applied for and allowed. United States Supreme Court.

**§ 7. Continuous Carriage from Point of Shipment to Point of Destination.**— That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

**Object and Scope of Section 7.**— The provisions of section 7 are supplemental to the provisions contained in section 3, and



should be read and construed in connection therewith. Section 3, last paragraph, forbids discrimination among carriers, and is mandatory in its requirements that all connecting competing lines shall be treated alike and furnished with equal facilities for interchange of traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property. The design of section 7 was to forbid devices on the part of the carrier, whereby, for the purpose of evading the provisions of the act, collusive arrangements may be resorted to to change time schedules, compel carriage in different cars, break bulk, or require a cessation, stoppage, or interruption to prevent the connecting carrier from performing his contract of "continuous carriage." The statute recognizes the fact that there may be circumstances when breaking bulk or temporary stoppage may be unavoidable. But such acts, if not done in good faith, but merely to evade the provisions of the act, are unlawful, and subject the offending carrier to the pains and penalties of the act. See authorities in this connection under section 3, page 69, *ante*. The provisions of section 7, however, are not discussed or referred to in such decisions.

**§ 8. Liability of Carrier in Damages.**— That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

**Object and Scope of Section 8.**— The object of section 8 in conjunction with section 9 was to create a civil remedy in favor

of shippers or persons who suffer loss or damage arising by reason of any violation of its provisions by the carrier, and to distinctly declare and impose the liability of the carrier. The act is penal in its nature in so far as it imposes a criminal liability for a breach of its conditions. It is a remedial statute in so far as it creates remedies by authorizing civil actions at law and in equity in the Federal courts. The remedial nature of the statute is emphasized by the amendment to section 22, as amended March 2, 1889, which declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies."

It has been held, in an able and well-reasoned opinion by Chief Justice ANDREWS in the Court of Appeals of the State of New York, that the Legislature, subject to the limitations of constitutional law, may not only invent remedies, but it may also create rights. *Bertholf v. O'Reilly*, 74 N. Y. 509.

Section 8 creates the liability of the carrier under the act.

Section 9 provides the remedies giving the Federal courts jurisdiction to enforce the liabilities imposed upon the carrier for a violation of the statute, both at law and in equity. In so far as the liability declared by this section relates to the duty which was imposed on the carrier at common law, the statute creates no new liability. The ninth section declares the mode in which such liability may be enforced in the Federal courts.

The liability under section 8 is confined exclusively to a breach of duty under the Interstate Commerce Act, in respect solely to interstate commerce. The liability of a common carrier engaged in domestic commerce remains as it always existed at the common law, except in so far as it has been regulated by the laws of the several States.

**Treble Damages — Common Law Superseded.**— At common law a shipper had a cause of action against the carrier to recover damages resulting from unreasonable and extortionate charges. But when the Legislature sees fit to legislate upon the subject the statutory remedy supersedes the common-law remedy, unless the statute declares that the remedy given by the statute is not exclusive but cumulative. (November, 1892, Cir. Ct. West. Dist. Mo.) *Windsor Coal Co. v. Chicago Railroad*, 52 Fed. Rep. 716.

**Treble Damages — State Statute.**— The State of Colorado in 1885, two years prior to the passage of the Interstate Commerce Act, passed a law (Laws 1885, chap. 309), prohibiting rebates and unjust discriminations by carriers against shippers, giving to a party injured the right to sue for a violation of the statute and authorizing a recovery in treble damages. A shipper of coal sued for a violation of the statute. Defendant set up as a defense a contract whereby it agreed to give the favored shipper and competitor of plaintiff a lower rate of freight only in case it furnished for transportation each year 200,000 tons of coal. The answer failed to allege that the favored shipper furnished this amount for transportation, but it was nevertheless given the rebate. Defendant also set up as an excuse for the giving of the rebate what it alleged was a claim it had against the favored shipper for damages. The damages were unliquidated and arose in tort. The court below ruled out both defenses and plaintiff had a verdict. Judgment affirmed. *Union Pacific v. Goodridge*, 149 U. S. 680.

The court held that the object of the Colorado statute was intended to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power not in the railroad company itself, but in the Railroad Commissioner to except "special cases designed to promote the development of the resources of this State." The court observed further that it is not the proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons on an absolute equality. *Ib.*

The above case doubtless was brought in the Federal court and the latter acquired jurisdiction by reason of the diverse citizenship of the parties, the action being to recover damages under a State statute.

**Suit at Law by Shipper — Pleading.**— An action by a shipper against a carrier to recover a payment charged by the carrier in



excess of charges to other shippers of similar goods to the same destination from another place of shipment of the same or greater distance where the charge is not in itself unreasonable prior to the amendment of March 2, 1889, declaring all remedies under the act to be cumulative, was held to be an action in the nature of a penalty on account of the wrongful conduct of defendant. In that action, where it appeared that the charge was not in itself unreasonable, the court said that plaintiff was bound by the rule of strict proof, and his complaint must clearly show a violation of the statute and the damages sustained by the shipper in consequence. *Parsons v. Chicago Railway*, 167 U. S. 447.

A violation of the statute must be clearly alleged and such violation will not be inferred from uncertain or ambiguous allegations. *Ib.*

**Discrimination — Suit in Equity — Pleading.**— A bill of complaint in equity seeking an injunction to restrain the carrier from charging unjust, unlawful, or unreasonable rates must set forth facts to sustain the charge. It must show that the plaintiff has no other means of transportation except upon the lines of the defendant carrier, and it must set forth that defendant charges less to other shippers under substantially similar circumstances and conditions, and the extortion or discrimination complained of must be set forth. *De Barg Baya Merchants' Line v. Jacksonville Railroad*, 40 Fed. Rep. 392.

**Limitation of Actions.**— The Interstate Commerce Act, which creates a statutory liability against the carrier in favor of a shipper for the full amount of damages sustained by the shipper in consequence of any violation of the provisions of the act, is in the nature of a penal statute, and the damages sought are in the nature of a penalty. As the act is silent as to the time within which a shipper may bring suit to recover damages under the act, the Statute of Limitations of the State in which the Federal court is situate will govern. *Ratican v. Terminal Railroad*, 114 Fed. Rep. 666; *Murray v. Chicago Railroad*, 92 Fed. Rep. 868.

**Limitation — Fraudulent Concealment.**— If fraudulent concealment is relied upon to avoid the Statute of Limitations,

it must appear that the concealment was such as prevented the party from exercising due diligence in discovering the facts. Plaintiff, in a suit to recover rebates and drawbacks, alleged that defendant publicly posted its tariff rates, and informed plaintiff that no deviations were made from the posted rates, and that no rebates, drawbacks, or concessions from such rates were given to any shipper, and that the rate charged plaintiff was the same as rates given to other shippers, and plaintiff believed these statements and representations and relied on them, but that they were false, fraudulent, and untrue, and that the fact that secret rebates were given was fraudulently concealed from plaintiff, who only ascertained them eighteen months before bringing suit.

The court held that no facts were stated to excuse the delay of eighteen months after the facts were discovered, and no facts from which the court could infer that plaintiff thereafter exercised due diligence to protect his rights. *Murray v. Chicago Railroad*, 92 Fed. Rep. 868; *Ratican v. Terminal Railroad*, 114 Fed. Rep. 666.

**Abatement — Revival of Action.**—The authorities indicate that an action or proceeding instituted by a shipper, or in his behalf, against the carrier, does not abate on the death of the plaintiff or petitioner. The general rule that actions in tort abate where the plaintiff dies, unless a different rule is prescribed by the statute, has no application to actions or proceedings under the Interstate Commerce Act. An action to recover for personal injuries dies with the person, unless the statute prescribes otherwise, because the injuries theoretically are to the person and not to his estate. Actions or proceedings under the Commerce Act are not, strictly speaking, actions in tort. They are brought to recover for injuries to the estate, not to the person. It has never been expressly decided thus far whether they are strictly actions upon contract, but they certainly arise by reason of the breach of an implied, if not an express, contract on the part of the carrier. The presumption of law is that any contract the carrier makes is legal. The law will imply a promise on the part of the carrier to carry for all for a like charge for a like service. A failure to do so would clearly be a breach of such implied promise. The

courts have said that an action against the carrier, under the act, to recover damages for excessive charges or unlawful discrimination is one sounding in tort. It has been held that the statute, with respect to actions of this character, is penal in its provisions, imposing a forfeiture or penalty. But, on the other hand, the acts of the carrier, when damage is shown, result in pecuniary loss to plaintiff and benefit to defendant. After plaintiff's death it is pertinent to show that the wrongdoer has derived benefit from the acts complained of, whereby plaintiff's estate became lessened and less beneficial to the latter's executors or administrators. By 4 Edw. III, chap. 7, *de bonis asportatis in vita testatoris*, by an equitable construction the executor or administrator shall have the same action for any injury done to the personal estate of the testator or intestate, whereby it became less beneficial to them as the deceased might have had, whatever the form of the action. Accordingly held that an action to enforce a forfeiture abates, unless the act complained of is devisable and the wrongdoer's estate has derived a benefit therefrom. *United States v. De Goer*, 38 Fed. Rep. 80; *United States v. Riley*, 104 Fed. Rep. 275.

An act of Congress imposed a legal liability upon the directors of a national bank for acts done which resulted in injury to the bank or its stockholders or creditors. The statute created a liability against the bank in damages for acts done by its officers in violation of the statute. The court held that the statute was to be construed as a remedial, not as a penal statute in this regard, and that an action under it survives against the estate of the defaulting officer. *Stephens v. Overstolz*, 43 Fed. Rep. 465.

Laws created for the prevention of fraud, or for the suppression of a public wrong, or to affect a public good, are not, with respect to the liability imposed, to be construed as penal statutes, although a penalty may be inflicted for their violation. *Taylor v. United States*, 3 How. 197; *Stockwell v. United States*, 13 Wall. 531.

The Supreme Court of the United States, in the case of *Louisville Railroad v. Behlmer*, 175 U. S. 648, decided that a cause of action prosecuted in behalf of a shipper who instituted proceedings through the Interstate Commerce Commis-



sion survived after the death of the petitioner. The court reversed the court below, but in so doing recited the fact that the petitioner had died and directed that his legal representatives be substituted as petitioners, and that the Commission should hear the evidence *de novo* and render its decision to conform to the rulings of the court as set forth in the opinion of Justice WHITE. *Louisville Railroad v. Behlmer*, 175 U. S. 648.

**§ 9. Remedy of Shipper in Alternative by Complaint to Commission or Suit in Federal Court.**—That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

**Object and Scope of Section 9.**—Section 9 prescribes the remedy for the enforcement of the liability which section 8 imposes

upon the carrier. It provides a dual remedy. It opens both the Circuit Courts and District Courts of the United States, and declares that any person claiming damages against the carrier arising from any violation of the act may bring suit to recover the same in either of said courts. It also declares that the party aggrieved may complain to the Interstate Commerce Commission as prescribed in section 12. These remedies, however, are not concurrent, and the suitor must elect before which tribunal he will appear. The statute declares that he cannot pursue both remedies. If the party elects to go before the Commission, the award or order of that body, if in his favor, must be enforced by the Commission upon its application to the Federal court, if the carrier neglects or refuses to comply with the terms and conditions embraced in the order.

In an action for damages by a shipper against the carrier in the Federal court, the plaintiff is not obliged to resort to the cumbrous and expensive equitable remedy of a bill of discovery in order to inspect the books and papers of the carrier, which may be pertinent and essential, to establish the evidence to sustain his cause of action. The statute confers power upon the court to compel the corporation carrier, or its agents, officers, servants, or trustees, to produce the books and papers of the defendant. The carrier cannot excuse such production upon the ground that under the Fifth Amendment to the Constitution he cannot be compelled to give evidence which may tend to incriminate him for the reason that the statute now declares not only that the evidence sought "shall not be used against any such person on the trial of any criminal proceeding," but that the witness shall not be prosecuted for any offense disclosed by reason of giving such testimony.

**Jurisdiction — Diversity of Citizenship not Essential.**— In ordinary controversies, where no Federal question is involved in the subject-matter of the action, and the parties to the action are all citizens of the same State, the Federal court acquires no jurisdiction, and it can exercise none. But if the controversy is "between citizens of different States" the Constitution extends the jurisdiction of the Federal courts to such a controversy. Article 3, section 2, provides that the judicial power of the United States shall extend to controversies

“between citizens of different States.” The Judiciary Act, approved March 3, 1875, as amended August 13, 1888, gives to the Circuit Courts of the United States original cognizance “of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,” in which there shall be a controversy between citizens of different States.

Where, however, a Federal question is involved, or the right sought to be enforced arises under the Constitution or laws of the United States, the Federal courts acquire jurisdiction irrespective of the citizenship of the parties. The jurisdiction of the Circuit Courts of the United States is defined in section 1 of the Judiciary Act of March 3, 1875, as amended August 13, 1888, as follows:

**Jurisdiction of Circuit Courts of the United States.—Sec. 1.—**That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.

But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court;

And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only



in the district of the residence of either the plaintiff or the defendant;

Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made;

And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law. (25 Stat. at L. page 433, chap. 866, approved August 13, 1888.)

**Jurisdiction of District Courts of the United States.**— Section 9 of the Commerce Act confers jurisdiction in suits to enforce its provision upon any District Court of the United States of competent jurisdiction. The plaintiff, in bringing an action under the Commerce Act, is not bound to bring it in a Circuit Court of the United States, pursuant to the provisions of the act of March 3, 1875, *supra*, but may elect to sue in either a Circuit or District Court of the United States of competent jurisdiction.

**Appellate Jurisdiction.**— For the provisions of law and statutes applicable to the appellate jurisdiction of the Federal courts, see *post*, page 171.

**Federal Jurisdiction under Interstate Commerce Act.**— The jurisdiction of the Federal courts in proceedings under the Interstate Commerce Act is conferred by that act, and arises from a right in the plaintiff which is conferred by a law of the United States. The judicial power of the Federal court is extended by the act to matters relating to rights of shippers engaged in interstate commerce. As the right of plaintiff arises under a Federal statute, diversity of citizenship of the parties to the record is not essential to confer jurisdiction. The jurisdiction of the court is based solely on the right claimed under the Interstate Commerce Act, and is exclusive. Whatever rights plaintiff may have at common law or before the passage of the act is immaterial to the question of jurisdiction. *Tift v. Southern Railroad Co.*, 123 Fed. Rep. 789 (Dist. Ct. So. Dist. Ga. July, 1903).

SPEER, J., in the *Tift* case, examined fully the question of the jurisdiction of the Federal court, and cited in support of his conclusions the following authorities: *Toledo R. Co. v. Penna. R. Co.* (Cir. Ct.), 54 Fed. Rep. 730; *Osborn v. Bank*, 9 Wheat. 738; *Kentucky Bridge Co. v. L. & N. R. Co.* (Cir. Ct.), 37 Fed. Rep. 567; *Ex parte Lennon*, 64 Fed. Rep. 320; s. c., 12 C. C. A. 134; s. c., 166 U. S. 548; *Tennessee v. Davis*, 100 U. S. 257; *Oregon Short Line v. Northern Pacific* (Cir. Ct.), 51 Fed. Rep. 465; *Allen v. Oregon Co.*, 98 Fed. Rep. 16; *De Barry v. Jacksonville Railroad* (Cir. Ct.), 40 Fed. Rep. 392; *Louisville Railroad v. Behlmer*, 175 U. S. 648; *Central Stockyards Co. v. Louisville Railroad*, 118 Fed. Rep. 113; *Augusta Railroad v. Wrightsville Railroad* (Cir. Ct.), 74 Fed. Rep. 522; *Oregon Railroad v. Northern Pacific Railroad*, 61 Fed. Rep. 158; s. c., 9 C. C. A. 409; *Chicago Railroad v. Burlington Railroad* (Cir. Ct.), 34 Fed. Rep. 481.

Actions and proceedings under the Interstate Commerce Act are such as derive their authority solely from the statute. As the subject-matter of such suits arise under an Act of Congress, the Federal courts acquire jurisdiction by virtue of the statute without regard to question of diversity of citizenship. (September, 1891, Cir. Ct. West. Dist. Tenn.) *Little Rock Railroad v. East Tennessee Railroad*, 47 Fed. Rep. 771.

#### **Jurisdiction Exclusive — Rebate Suits — Proper District.—**

The cause of action given to a shipper is for a violation of section 2, and the liability of the carrier for such breach is created by section 8. The remedy is provided by section 9. The jurisdiction of the Federal courts in such actions is exclusive, and in the trial thereof the Federal court does not exercise a jurisdiction which is concurrent in the State courts. The jurisdiction of the Federal courts under the Interstate Commerce Act is not affected by the provisions of the Judiciary Acts of March 3, 1887, and August 13, 1888, both passed subsequent to the passage of the Commerce Act. (*In re Hohorst*, 150 U. S. 653; *Railway Co. v. Gonzales*, 151 U. S. 496). Section 9 declares that such actions must be brought in "a circuit court of competent jurisdiction," which means a circuit court in any district in which the defendant can be found. *Van Patten v.*

*Chicago Railroad*, 74 Fed. Rep. 981 (June, 1896, Cir. Ct. No. Dist. Iowa, W. D.).

In the case cited the defendant was incorporated under the laws of Wisconsin, but operated its road in the northern district of Iowa. Defendant company was found and served in the latter district. *Held*, that jurisdiction attached, and that the Circuit Court had jurisdiction over the defendant corporation, and of the subject-matter of the action. *Ib.*

**Jurisdiction — Federal Question.**—The construction or interpretation of a State law, relating only to domestic commerce, or commerce wholly within the State, if involved in an action in which all the parties are residents of the same State does not necessarily involve a Federal question, and the Federal courts have no jurisdiction in such an action. If such an action be removed from the State court, the Federal court will remand it on the ground of want of jurisdiction. *Minnesota v. Northern Securities Co.* (April, 1904), 194 U. S. 48; *State of Iowa v. Chicago Railroad*, 33 Fed. Rep. 391 (December, 1887, Cir. Ct. No. Dist. Iowa).

See also "Jurisdiction on Removal," *infra*.

**Equity Jurisdiction as to Rates.**—A Circuit Court of the United States, in the exercise of its equity jurisdiction, at the suit of a party claiming to be aggrieved by rates of transportation in a State, imposed by a Railroad Commission of the State, may decree that the rates so established are unreasonable and unjust, and may, by injunction, restrain their enforcement; but the court has no power to establish rates, or to enjoin the State Commission from making and establishing new schedules of rates and tariffs. *Regan v. Farmers' Loan & Trust Co.*, 154 U. S. 362.

In such an action brought against the Commission and the individual members thereof, the court has jurisdiction as the action is not one against a State but against its administrative officers. *Ib.*

**Jurisdiction — Forcible Obstruction to Interstate Commerce — Injunction.**—The government of the United States may prevent a forcible obstruction of interstate commerce, and of the transportation of the mails, and for that purpose may,



through its Attorney-General or district attorneys, file a bill in equity in a proper Federal court and secure a writ of injunction to restrain acts of violence whereby interstate commerce and transportation of the mails is interfered with. It may enforce obedience to its orders by fine and imprisonment. In a proceeding to punish for contempt a violation of the court's order, the defendant is not entitled to a jury trial. *In re Debs*, 158 U. S. 564.

The equity jurisdiction of the Federal court is not ousted by the fact that the acts complained of also involve crimes and violations of criminal law. It is not the province of a court of equity to enjoin the commission of crimes. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by, or are themselves violations of, the criminal law. *Ib.*

**Jurisdiction — Not Ousted Pending Appeal.**— The jurisdiction of the United States Supreme Court cannot be ousted by the acts of defendants, sued as members of a freight association, by dissolving the association pending the appeal to the Supreme Court. It appeared that the relief sought was for an injunction to restrain the enforcement of a traffic agreement claimed to be in violation of the Sherman Anti-Trust Act, for a dissolution of the association formed to operate under it, and to have the agreement adjudicated as null and void. *Held*, that defendants, by their voluntary act in dissolving the association pending the appeal, could not oust the appellate tribunal of jurisdiction to pass upon the other questions involved in the appeal. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

An action against carriers to enforce obedience to an order of the Interstate Commerce Commission directing such carriers to furnish proper and reasonable facilities for interchange of traffic, presents a case arising under the Constitution and laws

of the United States of which the Federal courts have jurisdiction. *In re Lennon*, 166 U. S. 548.

Jurisdiction cannot be attacked in a collateral proceeding by one not a party to the original proceeding by evidence *dehors* the record, if the requisite citizenship giving the court jurisdiction appears upon the face of the bill in the original proceeding. *Ib.*

**Jurisdiction on Removal from State Court.**—An action in which the subject-matter does not involve a Federal question, and in which the parties are all residents of the one State, is cognizable only in the State court. If such a suit were brought originally in the Federal Court, the latter would have no jurisdiction of the action. If brought originally in a State court and removed to the Federal court, the latter would acquire no jurisdiction by virtue of such removal. If a Federal question should be raised in the action after removal, jurisdiction would not attach because the Federal court at the time of removal acquired no jurisdiction and could acquire none, by amendment or otherwise.

An action brought by a sovereign State of the Union as plaintiff in its own State court against non-resident defendants, where the action arises under the laws of the State, does not involve a Federal question. It is not an action "between citizens of different States," because a State is not a citizen within the meaning of that clause of the Constitution. In such an action the State court has exclusive jurisdiction. A Federal court has none, and can acquire none upon removal of the action from the State court. (April, 1904.) *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

In the case cited the State of Minnesota, as plaintiff, brought suit in a State court of the State of Minnesota against the Northern Securities Company, a New Jersey corporation, the Great Northern Railway Company, a Minnesota corporation, and the Northern Pacific Railway Company, a Wisconsin corporation. The suit was in equity for a decree annulling an agreement by the two defendant railway companies operating competing parallel lines of road from the Great Lakes to the Pacific ocean, whereby they sought to transfer to the defendant, the Northern Securities Company (not a railway corporation

or carrier, but a holding corporation), all the stock, property, and franchises of the two carrying companies in effect, though not in form, merging and consolidating them in the securities company. Plaintiffs also prayed for an injunction to restrain the consolidation. It was claimed by plaintiff that the transaction sought to be annulled destroyed all competition and created a monopoly of all railway traffic in the State of Minnesota to the great, permanent, and irreparable damage of the State and the people thereof in violation of the laws of Minnesota, and also in violation of the Sherman Act of July 2, 1890. Plaintiff claimed also that the transaction was an agreement in restraint of interstate commerce and was, therefore, void under the Federal statute. Defendant removed the case to the Circuit Court of the United States on the ground that a Federal question was involved.

*Held*, that the case involved no Federal question or controversy arising under the Constitution and laws of the United States. The court observed that "if relief had been asked upon the ground alone that what the defendant corporations had done and would, unless restrained, continue to do was forbidden by the statutes of Minnesota, the Circuit Court of the United States could not have taken cognizance of the case; for confessedly, such a controversy would not have been one between citizens of different States, nor could such a suit have been deemed one arising under the Constitution and laws of the United States." (April, 1904.) *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

As to the contention that a Federal question was involved by reason of the allegation that the agreement complained of was in restraint of trade and commerce, and in violation of the Sherman Act, forbidding combinations in restraint of interstate commerce, the court held the contention wholly untenable. The allegations did not involve a controversy within the jurisdiction of the Federal court. Criminal proceedings for a violation of the Sherman Act could be instituted only in the name of the United States. The action which had been removed was not (1) a criminal proceeding under sections 1, 2, and 3 of the Sherman Act; nor (2) a suit in equity in the name of the United States under section 4; nor (3) a proceeding in the name of the



United States to declare a forfeiture under section 6; nor (4) an action by any person or corporation for the recovery of three-fold damages for injury done to business or property by some other person or corporation under section 7. Hence not within the Sherman Act. Decree reversed and Circuit Court instructed to remand the case to the State court. *Ib.*

**Jurisdiction — Federal Question — Switching Facilities.—**

Defendant contracted with the city of Dubuque to allow all railroads entering the city to have the use of its switching and terminal facilities. The Legislature of Iowa also passed a statute that different companies might have the use of such facilities, and the Iowa Railroad Commission fixed the rates to be charged for such use. The defendant, and defendant Illinois Central railroad, subsequently acquired control of all lines entering the city, and acquired tracks and means of access which had been constructed by previous owners in streets and lanes under ordinances of the city. Thereafter complaint was made to the Railroad Commission of Iowa that excessive charges were exacted by defendant for use of terminal and switching facilities. The Commission ruled that all sidings in Dubuque were public highways and might be used by all carriers, and fixed the rates for their use. The State of Iowa sued in the District Court of Dubuque, a State court, to enforce by injunction the order of the State Commission. Defendant removed the cause to the Federal court. Plaintiff moved to remand. The court granted the order and remanded the case on the ground that no Federal question was involved. *State of Iowa v. Chicago Railroad*, 33 Fed. Rep. 391 (December, 1887, Cir. Ct. No. Dist. Iowa).

**Jurisdiction — Removal — None in State Court under Commerce Act.—** A State court has no jurisdiction to enforce the rights of shippers for a violation of the provisions of the Interstate Commerce Act. The jurisdiction of the Federal courts for violations of that act are exclusive. On removal of such a suit, begun in a State court to the Federal court, the latter acquires no jurisdiction, as the action in the State court was one in which the State court had no jurisdiction. *Sheldon v. Wabash Railroad*, 105 Fed. Rep. 785.

An action at law, brought by a shipper against a carrier to

recover damages for payments made under protest upon shipments of merchandise from one State (Illinois) to another, or to a foreign country, which rates were alleged to be unjust and unreasonable and contrary to the provisions of the Interstate Commerce Act, must be brought in a Federal court. *Swift v. Pennsylvania Railroad*, 58 Fed. Rep. 858 (November, 1903, Cir. Ct. No. Dist. Ill.).

The action in the case cited was brought in the State court, and was removed by defendants into the United States Circuit Court for the northern district of Illinois on the ground of diversity of citizenship. Demurrers were interposed before removal on the ground that the State court had no jurisdiction of the action. That Congress alone had power to regulate Interstate Commerce, and that unjust and unreasonable rates are condemned by the Interstate Commerce Act, and plaintiffs should have sued in the first instance in the Federal court. Upon the removal of the cases the demurrers were argued there, and were sustained on the ground that the State court had no jurisdiction of the action and none was acquired by the Federal court upon removal. The court invoked the familiar rule that in removed cases the jurisdiction of the Federal court is no broader than that of the court in which the action was begun, and the removal does not enlarge the right of the court to hear the cause. *Ib.*

**Jurisdiction Maintained on Removal.**—An action was brought in the State court by the carrier against the shipper to recover freight, under a State statute, on coal shipped from Clearfield, Pa., to Perth Amboy, N. J. It was removed to the Federal court, where defendant interposed a defense under the Interstate Commerce Act, and claimed that a Federal question was involved. Defendants claimed that the Federal court had no jurisdiction because the State court had none. *Held*, that the suit was not brought under the Interstate Commerce Act, but was brought to recover freight, and that the State court had jurisdiction, and upon removal the Federal could maintain jurisdiction. *Lehigh Valley Railroad v. Rainey*, 99 Fed. Rep. 596; s. c., on motion denying new trial after verdict for plaintiff, 112 Fed. Rep. 487 (January, 1902, Cir. Ct. East. Dist. Pa.).

**Jurisdiction not Conferred by Consent.**— Consent of the parties cannot confer jurisdiction. The question as to whether the Federal court has jurisdiction of an action must be tested by an examination of the bill or complaint filed on behalf of plaintiff or complainant. If the record contains an allegation which might seemingly involve a Federal question, and it becomes apparent at any stage that the case does not really and substantially involve a dispute or controversy of which the Federal court can take cognizance for the purpose of a final decree on the merits, it is the duty of the court to proceed no further, notwithstanding the stipulation and consent of the parties to remain in the Federal court. The court should remand the case as directed by the Judiciary Act of 1887-1888 (24 Stat. 552, chap. 373; 25 Stat. 433, chap. 866). This act provides, among other things, that the Circuit Court of the United States may take original cognizance of all suits of a civil nature at law or in equity arising under the Constitution and laws of the United States, where the matter in dispute, exclusive of costs, exceeds in value the sum of \$2,000. The second section provides for the removal from a State court of "any suit of a civil nature, at law or in equity, arising under the Constitution and laws of the United States, \* \* \* of which the Circuit Court of the United States is given original jurisdiction by the preceding section." Under section 2 removals from a State court can be made only by defendant in suits "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, thus limiting the jurisdiction of the Circuit Court of the United States, on removal by the defendant under this section, to such suits as might have been brought in that court by the plaintiff under the first section. (24 Stat. 553; 25 Stat. 434.) *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

The above case was brought in a State court of Minnesota, and was removed by defendants to the Circuit Court of the United States. The case was tried in Federal court, and a decree was rendered therein against the plaintiff and in favor of defendant. When the case reached the Supreme Court of the United States, the court, before giving any decision on the merits, directed counsel to submit briefs on the question of jurisdiction, notwith-



standing all parties were willing and consented that the action might remain in the court. Upon the question of jurisdiction it was held that a Circuit Court of the United States cannot take cognizance of an action which involves no Federal question unless it appears from the record that the controversy is between citizens of different States. And it must appear that all the parties plaintiff are citizens of the same State, and that none of the defendants are citizens of the State of which plaintiff is a citizen. A State is not a citizen within the meaning of this clause of the Constitution. *Held* further, that the suit presented no Federal question or controversy arising under the Constitution and laws of the United States. *Ib.*

**Suit under Commerce Act not Removable.**— Upon the authorities it seems clear that if an action to enforce any of the provisions of the Interstate Commerce Act is brought in a State court, the suit cannot be removed into a Federal court for the reason that the State court could acquire no jurisdiction of the action, and upon removal the Federal court could acquire none. In such an action the jurisdiction of the Federal court is original and exclusive, and plaintiff must bring his suit in the Federal court in the first instance.

**Suits Removable.**— Actions brought under a State statute may be brought in a State court, or if the parties in such an action are citizens of different States, and the amount involved exceeds \$2,000, exclusive of interest and costs, the action may, on defendant's motion, be removed to a Circuit Court of the United States, not on the ground that a Federal question is involved, but solely on the ground that it is a controversy between citizens of different States upon a cause of action arising under a State statute.

Suits brought in a State court to enforce treble or single damages given by State laws for merchandise shipped within the State in violation of such laws could be removed by defendant from the State court to a Circuit Court of the United States, if the amount involved, exclusive of interest and costs, exceeded \$2,000, and the parties were citizens of different States, namely, all plaintiffs were citizens of one State, and all defendants were citizens of another State or States.

The manner in which suits can be removed from a State court are set forth in the act of March 3, 1875. See *infra*.

**Mode of Removal from State.**—The provisions of the act of March 3, 1875 (chap. 137), which relates to the mode in which causes shall be removed from a State to a Federal court as amended by act of August 13, 1888 (chap. 866), is as follows:\*

**Sec. 2. Suits Involving Federal Law.**—That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

**Suits between Citizens of Different States.**—And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

**Removal—Local Prejudice.**—And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause:

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\* For section 1 of the statute, see *ante*, page 32.

**When Suit may be Severed.**— *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

**Local Prejudice when Suit Remanded.**— At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

**Remanding Order not Appealable.**— Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

That section 3 of said act be, and the same is hereby, amended so as to read as follows :

**Sec. 3. Petition and Bond.**— That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if



said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit;

And the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court;

**Suit Affecting Title to Land.**— And if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of \$2,000, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial;

And if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district;

And any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

**Sec. 2. Receiver Governed by State Laws.**— That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not ex-

ceeding \$3,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**Sec. 3.** That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed;

But such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

**Sec. 4. Citizenship of National Banks.**— That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located;

And in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

**Sec. 5. Laws not Repealed.**— That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

**Sec. 6. Repealer.**— That the last paragraph of section 5 of the act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed:

*Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

**Sec. 7. Appointment of Relatives Forbidden.**— That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member. (August 13, 1888.)

**Remedy — Nature of Injunction.**— The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular State in which the suit may be brought. One entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. An enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States.

[Citing *Broderick's Will*, 21 Wall. 503; *Holland v. Challen*, 110 U. S. 15; *Dick v. Foraker*, 155 U. S. 404; *Bardon v. Land Co.*, 157 U. S. 327; *Rich v. Braxton*, 158 U. S. 375.] But if the cause in its essence be one cognizable in equity, the plaintiff — the required value being in dispute — may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of Federal jurisdiction. *Smyth v. Ames*, 169 U. S. 466.

So held in a suit for an injunction in the United States Circuit Court brought to restrain State officers from enforcing a schedule of rates of transportation within the State, promulgated pursuant to a State statute which provided also a penalty for its violation and mode of enforcement. *Ib.*

**Injunction Pending Investigation — Restitution.**— Pending an investigation by the Interstate Commerce Commission upon complaint of shippers to redress grievances against carriers by reason of unjust and unreasonable discrimination and unjust and unreasonable rates, whereby the business of the shipper may be impaired or ruined by reason of the acts complained



of, whereby the carrier prevents complainants from competing with other more favored shippers transporting merchandise to the same locality in the same territory, the court may enjoin the enforcement of the rates complained of pending such investigation. On the presentation of the Commissioners' report pending the action, the court will take such other or further action as may be conformable to law and the principles of equity. The court may also, in case a preliminary injunction is issued, compel restitution of sums illegally exacted in the interim. (So. Dist. Ga., July, 1903). *Tift v. Southern R. Co.*, 123 Fed. Rep. 789.

**Contempt.**— The court has power to punish an employee of a carrier for contempt where the latter refuses to obey an injunction against his employer if the employee has knowledge of the injunction and intentionally violates it by refusing to haul cars of the complainant "boycotted" by a union of which the employee is a member. This power exists although the employee was not a party to the suit, and was not served with the injunction order. *In re Lennon*, 166 U. S. 548.

**Parties.**— When the Interstate Commerce Commission makes an order involving through rates participated in by more than one road, under a common control, management, or arrangement, and sues in the Circuit Court to enforce its order, an omission to name one of the roads owning a portion of the line over which the through freight is carried is not fatal to the jurisdiction. The company omitted from the bill would have been a proper party, but it is not essentially a necessary party. *Texas Railway v. Interstate Com. Co.*, 162 U. S. 197.

**Evidence — Commission an Expert Tribunal as to Rates.**— On the question as to weight to be given to the evidence of traffic managers with respect to reasonableness of rates, Judge TAFT observed: "It has been suggested that traffic managers are much better able by reason of their knowledge and experience to fix rates and to decide what discriminations are justified by the circumstances than courts. This cannot be conceded so far as it relates to the Interstate Commerce Commission which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is in a sense an expert tribunal; but it is true of the Federal court.

Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts whether railway managers or commerce commissioners is too clear to admit of dispute." *East Tennessee Railway v. Interstate Com. Co.*, 99 Fed. Rep. 52; reversed on another point, 181 U. S. 1.

**"Switching" Charges may be Regulated by the State.—**

The service rendered by a carrier at a terminal known as "switching" is a local service. It forms no part of the charge for interstate transportation, is a terminal charge and not governed by the provisions of the Interstate Commerce Act, and the charges therefor may be regulated by the State (Minnesota) Railroad Commission. *Chicago Railroad v. Becker*, 32 Fed. Rep. 849 (December, 1887, Cir. Ct. Dist. Minn.).

The Chicago, Milwaukee and St. Paul railroad, a Wisconsin corporation, brought a suit in equity to restrain the Minnesota Commission from enforcing its schedule of rates for "switching" services. Plaintiffs moved for a preliminary injunction. Defendants opposed the application on the ground that the rates fixed by defendants was for services for terminal facilities, which formed no part of the carrier's charge for transportation, and did not affect interstate commerce. The court denied the motion for an injunction, and held that the question as to whether the rates of the State Commission were unreasonable was the only issue, and that must be disposed of on the trial. *Ib.*

**Appellate Jurisdiction of Federal Courts.—** Under the act of February 11, 1903, to expedite cases brought under the Interstate Commerce Act, and under the Sherman Anti-Trust Act, in which the United States is party complainant, appeals to the United States Circuit Court of Appeals are abolished and the appeal may be taken directly from the Circuit Court to the Supreme Court of the United States.

In other cases not within the act of February 11, 1903, an appeal lies in the first instance from the Circuit or District Court of the United States to the United States Circuit Court of Appeals. The jurisdiction of this tribunal is defined in the Judiciary Act of March 3, 1891 (chap.

517), entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." The provisions of this act with regard to appeals are as follows:

**Sec. 4. Appeals from District Courts.**— That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts.

But all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

**Sec. 5. Appeals Direct to U. S. Supreme Court.**— That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.\*

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

**Sec. 6. Appeals to U. S. Circuit Court of Appeals.**— That the circuit courts of appeals established by this act shall exercise appel-

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\*Appeals may also be taken directly to the Supreme Court in certain cases under the act of February 11, 1903, which is made applicable to the Sherman Act and Commerce Act, *post*, under the Elkins Act. See *ante*, page 137.



late jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases,

Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed \$1,000 besides costs.

But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

**Sec. 7. Appeals from Interlocutory Judgments — Injunctions.**—That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals:

PROVIDED, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

§ 10. Criminal Liability of Carrier.— That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense.\* [*Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine herein-

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\* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903. Failure to file or publish tariff rates is punishable by a fine of not less than \$1,000 nor more than \$20,000 for each offense. See Elkins Act, *ante*, page 134.

before provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.]

**Criminal Liability of Carrier for False Bills, Weights or Classification.**— Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars,\* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.]

**Criminal Liability of Shipper for False Bills, Weights or Classification.**— Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who

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\* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.



shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars\* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.]

**Joint and Several Criminal Liability of Shipper and Carrier.**— If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which

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\* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.

such offense was committed, be subject to a fine of not exceeding five thousand dollars,\* [or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court,] for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (*As amended March 2, 1889.*)

**Object and Scope of Section 10.**—Section 10 declares the pains and penalties incurred by any person or corporation offending against the provisions of the act, and may be designated as the penal section. It has been modified by the Elkins Act of February 19, 1903, in so far as to abolish imprisonment as a penalty; to declare in what district persons guilty of violations of the Commerce Act may be indicted, and extends also equitable remedies to secure the enforcement of the act. The Elkins Act declares that “imprisonment wherever now prescribed as a penalty being hereby abolished.” See Elkins Act, *ante*, page 134.

Imprisonment, however, may still be imposed under section 6 in proceedings to punish the carrier, its officers, agents, or servants for violation of a mandamus issued under that section. Section 6 declares that a failure to comply with the requirements of such writ shall be punishable as and for a contempt. See section 6, *ante*, page 132.

**Receiver Indictable.**—A receiver of a railroad corporation is bound to comply with the provisions of the Interstate Commerce Act in like manner as the insolvent corporation which the receiver represents as trustee. He may be indicted for a violation of its provisions, but he cannot be held to be guilty of a crime

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\* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that “no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished.” See Elkins Act, *ante*, page 134.

for failing to comply with a joint traffic agreement to which he was not a party, and the terms of which he never sanctioned or recognized in any way. *United States v. De Coursey*, 82 Fed. Rep. 302 (August, 1897, Dist. Ct. No. Dist. N. Y.).

**False Billing -- Where Indictable.**— The offense of “false billing” created by section 10, paragraph 3, is complete when the property is delivered for transportation, and such transportation to the place of destination is not essential to constitute the crime. The gist of the offense is the fraudulent act by which the lower rate is secured for the transportation of the property. Prior to the passage of the Elkins Act of February 19, 1903, it was held under section 10 that the crime of false billing could be prosecuted only in that district, being the district where the offense was committed, and not elsewhere. *Davis v. United States*, 104 Fed. Rep. 136 (October, 1900, C. C. A., 6th Circuit).

In the *Davis* case, which arose prior to the passage of the Elkins Act, defendant was indicted in the Federal court in Texas, charged with a violation of section 10, paragraph 3, of the act for having knowingly and willfully, by “false billing,” etc., obtained transportation of property at less than lawful rates. The indictment charged that the acts were committed by defendant in Cincinnati in the southern district of Ohio where the false representations were made and the goods delivered. The court discharged the prisoner on the ground that the crime charged in the indictment was not committed in Texas, the point of destination to which the goods were shipped, but was committed in the southern district of Ohio, and that was the only district in which defendant could lawfully be indicted and tried. *Ib.*

The court held further that section 731 of the Revised Statutes had no application. That section provides: “When any offense against the United States is begun in one judicial district and completed in another it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, or punished in either district in the same manner as if it had been actually and wholly committed therein.” That the offense under section 10 was not one which required the transportation of the property to Dallas, Tex., to complete it, and that under section 731, United States Revised Statutes, it



might be prosecuted either where the shipment was made or where it terminated; but under the Commerce Act it was complete where the shipment was made and the false billing was done. *Id.*

The defect in section 10 was regarded as serious under which it was held that one guilty of a violation of its provisions for "false billing" could be indicted only in the district where the billing was done, and the property delivered for transportation, and that defendant, after committing the crime, could not be indicted in a district embracing the point of destination. Under the ruling in the *Davis* case it was deemed to be comparatively easy to evade the statute. The language of the section was broadened, in effect, by the provisions of the Elkins Act of February 19, 1903, in this regard so as to make the act indictable in the district where the offense was committed, or through which the transportation may have been conducted, and commensurate with the provisions of section 731 of the Revised Statutes. The Elkins Act expressly declares that violations of the Commerce Act "shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one district and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. See Elkins Act, §§ 1, 3, *ante*, pages 134, 136.

**Discrimination—Remedy by Injunction in Suit by the United States.**—The remedy for the discrimination against shippers forbidden by section 2 is three-fold. Each shipper may maintain a civil action for damages against the carrier for its violation. A criminal prosecution may be maintained against the carrier for such violation under section 10. The Elkins Act, approved February 19, 1903, has now created a remedy in equity in which a writ of injunction may issue in addition to these remedies. If it appears that the carrier "is committing any discrimination forbidden by law" it shall be the duty of the Interstate Commerce Commission to inquire and petition a Circuit Court of the United States to secure a discontinuance of such

discrimination by proper orders, writs, or process, and such proceeding may be instituted after a preliminary inquiry directly on behalf of the United States as plaintiff. A Circuit Court of the United States, in the exercise of its chancery powers in such an action; has plenary power to issue an injunction to correct the evil complained of. The jurisdiction of the court was assailed by defendant on demurrer to the bill filed against it. The court overruled the demurrer and granted an injunction. *United States v. Michigan Central*, 122 Fed. Rep. (April, 1903, Cir. Ct. No. Dist. Ill., N. D.).

The case cited above arose on a demurrer to the complaint and motion for a preliminary injunction. The bill charged defendants with discrimination in the transportation of grain and packing-house goods. It was alleged that in transporting grain the carriers had entered the wheat belt and, by discriminating against competitors, defendants had eliminated all competition, leaving but a single favored dealer who purchased all the grain at all the stations along defendant's lines. The court, GROSSCUP, J., after stating the allegations of the complaint, said: "Of course, under such conditions the grain grower was deprived of the benefit of competition among dealers. The practical effect was the same as if the railroads had established agencies of their own to purchase the grain, and by giving to these discriminatory advantages had excluded all other grain purchasers from the field. Such a policy necessarily destroys the competition to which the grain growers in a given district are entitled.

"The Interstate Commerce Act confers upon each citizen engaged in productive industry, whether manufacturing, commercial, or agricultural, within the district traversed by these roads, the substantive right of having his product transported by the common carriers of the country at rates obtained by his competitor. This right of equal treatment at the hands of the common carriers is as much a right of property and affects as directly his interest in property as any other right of property that he may have under the law, statutory or common.

"Actions at law for the injuries described are plainly inadequate. The act of the railroad that affects the grain grower is not a single unlawful act; he is making shipments to-day, to-morrow, and next month. The policy of the roads, as shown

in the bill, affects him in each of these shipments and will affect him in all future shipments. His situation is analogous to that of one who is subjected to continuous trespass and who cannot on that account, in an action on a single trespass, obtain ample redress. Nothing short of the prohibitive arm of a Court of Chancery can give to the grain growers and other producers affected by this policy of the railroads, the free competitive field for the sale of their products to which they are entitled as a substantive right under the terms of the Interstate Commerce Act."

A suit in equity will lie, under the Elkins Act of February 19, 1903, at the instance of the government of the United States, to prohibit the execution of this policy of discrimination on the part of the carrier. The persons affected constitute the entire population of the districts through which defendants' roads are operated, by reason of which the remedy asked is in the nature of government for the entire population rather than of individual redress for the injuries done to persons in scattered localities. The remedy is analogous to that sought in equitable actions by which many people obtaining rights from common sources may be protected at the suit of such common source. A preliminary injunction, commensurate with the needs of the case, is granted upon the authority conferred by the Elkins Act. *Ib.*

The ruling of Judge GROSSCUP, in which he held that the Elkins Act was a remedial, as well as a penal statute, and was retrospective in its operation, is now authoritatively settled by the ruling of the Supreme Court of the United States in the *Missouri Pacific* case, *ante*, where the validity of the statute was affirmed and the propriety of the equitable remedy prescribed by it upheld. *Missouri Pacific Railroad v. United States*, 189 U. S. 274.

§ 11. Interstate Commerce Commission Created.—That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the



term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

**Object and Scope of Section 11.**— A statute, no matter how useful or beneficial its provisions may be, is of little avail unless some adequate provision be made for its execution. The Interstate Commerce Act must be enforced by some body or corporation whose exclusive duty it shall be to secure its enforcement. Actions at law and suits in equity may be maintained by individual shippers who may invoke the aid of the courts to redress violations of its provisions. Such actions on the part of shippers, however, are not efficient to secure the continued and uniform observance on the part of the carrier of the requirements of the act. In order to secure the fruits of the legislation regulating interstate commerce, Congress deemed it wise and prudent to create a commission, a body corporate, to compel the continuous

observance of the provisions of the act, and to confer upon such body ample power and authority in that regard.

This commission is one of the most useful instrumentalities, as an adjunct of government, to secure to the commercial world the beneficial enjoyment of the acts of Congress upon the subject of interstate commerce. The powers conferred upon the commission created under section 11 are partly ministerial and partly executive. It possesses no judicial functions, but is given power to enforce its orders, mandates, and decrees through the Federal courts.

The history of the commission during seventeen years of its existence has demonstrated its usefulness. It is composed of a conservative and dignified body of men, who have earned the confidence of the public. It has performed its arduous, difficult, and manifold duties faithfully and well. In view of its work Congress has not only extended its powers and jurisdiction under section 12 of the Interstate Commerce Act, but has given to it power to enforce its subpoenas requiring the production before it of books and papers, by making it a penal offense to disobey the subpoena (Act of February 11, 1903, *post*, page 188), and has amplified its powers under the Elkins Act of February 19, 1903. (See *ante*, page 133.) It has been charged also with the duty of aiding United States District Attorneys in the enforcement of the Safety Appliance Law. (Act of March 2, 1893, *post*, page 340.) Also to secure the enforcement of the acts regulating telegraph lines upon government, military, and post-roads. (Act of August 7, 1888, *post*, page 330.)

Its duties are becoming more important as the population of the country expands and its commercial wealth and importance increases. It is a body whose services are essential and absolutely necessary to protect the shipper, carrier, and consumer alike.

**Power to Fix Rates — Pending Legislation as to.**— Merchants and shippers throughout the country have claimed that one of the principal defects in the Commerce Act consisted in the fact that it conferred no power on the Interstate Commerce Commission to fix rates subject to review by the Circuit Court of the United States. Commercial bodies, and Boards of Trade in the principal cities in the United States, have from

time to time sought to secure legislation to secure this defect, and have urged upon Congress the necessity of reasonable legislation to clothe the Commission with power to fix rates where it has been shown, upon pleadings and evidence before the Commission, that a given rate complained of was unreasonable and unjust. A number of bills are now before Congress having this end in view. See *post*, under head of "Pending Legislation," page 192.

**Power of Congress to Create the Commission — Eleventh Section Constitutional.**— Congress, under the grant of power to regulate commerce among the several States and with foreign nations, may create an administrative body with authority to investigate the subject of interstate commerce with power to call witnesses before it and require the production of books, documents, and papers relating to the subject. A proceeding by such a body, whereby the aid of a Circuit Court of the United States is invoked to compel witnesses to appear and testify, and to make an order requiring them to do so, is not merely advisory in its nature, but constitutes a judicial proceeding, notwithstanding the fact that the effect of the proceeding is to aid a body whose duties are administrative and executive only in the performance of duties imposed upon it by Congress. *Interstate Com. Co. v. Brimson*, 154 U. S. 447.

For further discussion of the powers and duties of the Interstate Commerce Commission and the authorities relating thereto, see *infra*, § 12.

**The Commission is a Corporation.**— The Interstate Commerce Commission is a body corporate capable of suing and being sued by and in its corporate name and not in the individual names of the persons composing it. *Texas Railway v. Interstate Com. Co.*, 162 U. S. 197.

**§ 12. Commission may Prosecute through United States District Attorney.**— That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed



as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

**Witnesses — Attendance Compulsory.**— Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

**Penalty for Disobedience of Witness.**—And any circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

**Testimony Taken by Deposition.**—The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties,

nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

**Deposition, how Taken.**— Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

**Foreign Witnesses — Fees.**— If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States. (*As amended March 2, 1889, and February 10, 1891.*)



**§ 12 Supplemented — Relating to Testimony — Act Approved February 11, 1893.**— The authority embraced in section twelve of the Interstate Commerce Act, conferring power upon the Commission, with respect to investigations and inquiries, and the attendance of witnesses and the production of books and papers before it, was enlarged and extended by an act of Congress, approved February 11, 1893, chap. 83, entitled “An Act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled ‘An Act to Regulate Commerce,’ approved February 4, 1887, and amendments thereto.” The provisions of this supplemental Act are as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person [Immunity of Witnesses] shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled “An act to regulate commerce,” approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or

proceeding: *Provided*, That [Perjury Punished] no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

**Penalty for Refusal to Testify.**— Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars,\* [or by imprisonment for not more than one year or by both such fine and imprisonment.]

**Object and Scope of Section 12.**— Section 12 defines the powers and duties of the Interstate Commerce Commission, created by the previous section. These duties are primarily to investigate and inquire into the mode in which the vast commerce of the country is conducted with a view to secure the observance of the acts of Congress defining how such commerce shall be regulated. It defines the manner in which the Commission shall secure information and ascertain facts bearing upon the vast field over which it is given supervision. The duties thus conferred are arduous, delicate, and difficult, for the Commission must be just to the carrier as well as to the shipper and to the general public which is the consumer, and must eventually pay the tariff exacted on all goods transported. The purchase price of every article must, in addition to its cost, embrace also the cost of transportation. The public is in one sense the chief party in interest for it is the consumer, and the consumer in every instance must pay the freight.

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\* The penalty of imprisonment was abolished by the Elkins Act, approved February 19, 1903, which declares that "no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished." See Elkins Act, *ante*, page 134.

The difficulties with which the Commission must contend are obvious. The information sought must come from the carrier because investigations are usually instituted upon complaints of shippers claiming to be injured by the carrier by reason of discrimination, rebates, and manifold devices whereby goods are carried for competitors for less than schedule rates, whereby the rival is able to undersell and ruin a shipper who pays more freight than his competitor. Rebates and other forms of discrimination must of necessity be practiced secretly. The conduct of those engaged in the practice is made a crime. The carrier and favored shipper appear before the Commission usually as accused persons. The Commission is the tribunal before which they are tried in the first instance. The evidence to convict must come largely from the defendants and must be established upon an examination of their officers, agents, servants, and employees, and inspection of the books, papers, contracts, and documents. Under the Elkins Act the difficulty as to proof is not so great as formerly as that act makes the offer to give a rebate a crime.

The information sought by the Commission is rarely given without a stubborn and protracted legal contest. Congress has, therefore, armed its Commission with plenary power and authority to compel witnesses to testify and books, papers, and documents to be produced, and has authorized the Federal courts to enforce its orders. The arm of the Commission is practically the arm of the court, though the Commission cannot exercise directly judicial functions. Prior to the supplemental legislation under the act of February 11, 1893 (Laws 1893, chap. 83), *supra*, it was almost impossible for the Commission to perform successfully the duties imposed upon it for the reason that section 12 was not broad enough to secure immunity to witnesses summoned before it. The section, as it stood prior to the act of February 11, 1893, declared that testimony given by a witness which might tend to criminate him should "not be used against such person on the trial of any criminal proceeding." This language was held not sufficient to secure immunity to the witness who was protected by the Fifth Amendment which declares that no person shall be compelled "in any criminal case to be a witness against himself."



The difficulty was overcome by the act of 1893 which took away entirely the right to prosecute the witness on account of the testimony required to be given. Section 3 of the Elkins Act of February 19, 1903, contains the same provision and makes it applicable to all prosecutions under the direction of the Attorney-General of the United States in the name of the Interstate Commerce Commission under the Sherman Act or under the Interstate Commerce Act. See Elkins Act, § 3, *ante*, page 137.

**Powers of Commission — Cannot Fix Rates.**—The powers conferred upon the Interstate Commerce Commission by the Interstate Commerce Act is not a legislative power which enables it to fix absolutely maximum or minimum rates. The act gives the Commission power to pass upon the reasonableness of existing rates, but this power does not necessarily imply power to prescribe rates, but only to pass upon the question as to whether they are reasonable, and their functions require them to examine the facts relating to the question and give all evidence its proper weight. The Commission cannot act arbitrarily in fixing rates. Prescribing rates without acting upon the evidence would be to prejudge the case. *Interstate Com. Co. v. Cincinnati Railway Co.*, 167 U. S. 479 (May, 1897); *New Orleans & Texas Railroad v. Interstate Com. Co.*, 162 U. S. 184, followed.

The court was asked to answer a question as to the powers of the Commission certified to it by the United States Circuit Court of Appeals (6th Circuit) with regard to rates prescribed by it which should control in the future. In the course of its opinion the court cited the statute of a number of States as to powers conferred on Boards of State Commissioners, to-wit, Alabama, California, Florida, Georgia, Illinois, Iowa, Minnesota, Mississippi, New Hampshire, North Dakota, South Carolina, Kansas, Kentucky, Massachusetts, New York, and Vermont and observed: "Nowhere in the Interstate Commerce Act do we find words similar to those in the statutes referred to giving to the Commission power to 'increase or reduce any of the rates;' 'to establish rates of charges;' 'to make and fix reasonable and just rates of freight and passenger tariffs;' 'to make a schedule of reasonable maximum rates of charges;' 'to fix tables of maximum charges;' to compel the carrier to adopt such rate, charge, or

classification as said Commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given.

The first section of the act provides that "all charges \* \* \* shall be reasonable and just and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." The power given is the power to execute and enforce, not to legislate. It is a power partly judicial, partly executive and administrative, but not legislative. The power to prescribe a tariff of rates is a legislative and not an administrative or judicial function, and is one of supreme delicacy and importance, and must be expressly delegated, and cannot be implied. The act does not confer upon the Commission power to prescribe future rates of tariff and it cannot, therefore, invoke a judgment by *mandamus* to enforce such future tariff. It has power to inquire as to manner in which the carrier conducts its business and compel complete and full information, and is charged with the duty to see that the carrier does not violate the law as to long and short hauls, discrimination, rebates, or preferences, and enforce the equality toward all shippers, enforce publicity of rates, and hold carriers to strict compliance to the provisions of the Interstate Commerce Act. *Ib.*

See also *Farmers' Loan and Trust Co. v. Northern Pacific*, 83 Fed. Rep. 249 (October, 1897, C. C. D., Wash., N. D.); *Interstate Com. Co. v. Northern Railroad*, 83 Fed. Rep. 611 (November, 1897, C. C. A., 4th Circuit).

**Power to Fix Rates — Pending Legislation.**— Commercial bodies and Boards of Trade throughout the country have claimed ever since the passage of the Commerce Act that its principal defect consisted in the fact that it contains no provision authorizing the Interstate Commerce Commission power to fix rates which shall be *prima facie* lawful, and which shall remain operative until set aside or modified by a Federal court of competent jurisdiction. Experience has shown that the failure of Congress to confer this power on the Commission has greatly impaired its usefulness. Congress has power to confer such authority. It is a power which the States usually confer on their Boards of State Commissioners. In the *Cincinnati Railroad* case, *supra* (167 U. S. 479), the court reviews the laws of six-

teen States, in which power to increase, reduce, or fix reasonable and just rates of freight and passenger tariffs was conferred on their respective Railroad Commissioners. It is a legislative and not an administrative or judicial power and must be expressly delegated. Such a power cannot arise by implication. Merchants and shippers throughout the United States have been persistent in their appeals to induce Congress to incorporate such power in the Interstate Commerce Act, and the demand for such legislation becomes more urgent every year. During the present session of the Fifty-eighth Congress five bills have been introduced in the House, and one in the Senate having this end in view. The five bills introduced in the House are now pending before the Committee on Interstate and Foreign Commerce. The Senate bill is pending before the Senate Committee on Interstate Commerce. These bills in the order of their introduction are as follows:

“A bill to define the duties and powers of the Interstate Commerce Commission,” introduced in the House by Mr. Cooper of Wisconsin, December 8, 1903. “A bill to empower the Interstate Commerce Commission to fix transportation rates in certain contingencies,” introduced in the House by Mr. Williams of Mississippi, December 10, 1903. “A bill to further define the duties and powers of the Interstate Commerce Commission,” introduced in the Senate by Mr. Quarles of Wisconsin, December 12, 1903. “A bill to further regulate commerce and protect trade and commerce against unlawful restraints and monopolies,” introduced in the House by Mr. Adamson, January 19, 1904. “A bill to increase the powers of the Interstate Commerce Commission, and to expedite the final decisions of cases arising under the act to regulate commerce by creating an interstate commerce court,” introduced in the House by Mr. Hearst of New York, March 11, 1904. “A bill to increase the powers of the Interstate Commerce Commission,” introduced in the House by Mr. Breazeale, April 6, 1904. The object and purpose of these various measures is to confer power on the Interstate Commerce Commission to prescribe rates, subject to review by the courts. They are more or less elaborate in detail. The bill introduced by Mr. Hearst seeks to take the burden of



cases under the act from the crowded calendars of the Federal courts, by creating a new Federal court, having exclusive jurisdiction of all cases arising under the act, to be known as "The Court of Interstate Commerce." The proposed act provides that the decisions of this court shall be final unless a constitutional question is involved. Such question may be certified to the Supreme Court of the United States, or unless the latter court directs the record of the Court of Interstate Commerce to be brought before it by writ of certiorari.

The bill introduced in the House by John Sharp Williams of Mississippi, provides as follows:

SEC. 1. That when, hereafter, the Interstate Commerce Commission shall declare a given rate for transportation of freight or passengers unreasonable, it shall be the duty of the Commission, and it is hereby authorized to perform that duty, to declare at the same time what would be a reasonable rate in lieu of the rate declared unreasonable.

SEC. 2. That whenever, in consequence of the decision of the Interstate Commerce Commission, a rate has been established and declared as reasonable and litigation shall ensue because of such decision, the rate fixed by the Interstate Commerce Commission shall continue as the rate to be charged by the transportation company during the pendency of the litigation and until the decision of the Interstate Commerce Commission shall be held to be error on a final judgment of the questions involved by the United States court having proper jurisdiction.

Mr. Williams clearly set forth the necessity of such legislation as is provided for in his proposed act in a speech delivered July 8, 1904, before the Democratic National Convention at St. Louis. In assigning the reasons for his proposed legislation Mr. Williams said:

"It [the Interstate Commerce Commission] can declare a given rate of 50 cents, let us say, to be unreasonable, but as it cannot prescribe what would be reasonable in its stead, the railroad can do one or two things. It can either file an appeal which suspends the decision of the Commission while the appeal is being 'long drawn out' by the railroad interested, or it can change the rate to  $49\frac{1}{2}$  cents, and when that has been declared unreasonable can change it again to  $49\frac{1}{4}$  cents, and when that has been declared unreasonable can change it to  $49\frac{1}{8}$  cents, and

so on *ad infinitum*, compelling the newly aggrieved citizen in each case to bring suit, at the risk of being punished industrially by the railroad for what it calls 'unfriendly conduct,' and without the hope of any substantial immediate redress.

"A bill to give the Interstate Commerce Commission power, not to declare rates generally, not to fix a schedule of rates for all the roads in the country engaged in interstate commerce, but power to declare a reasonable rate in its stead in particular cases where a rate established has been declared unreasonable, this rate to be maintained until set aside by law, has been pending before the Committee on Interstate and Foreign Commerce in the House of Representatives since this Congress met."

**Rates must be Reasonable—In Fixing Rates Commission must Act on Competent Evidence.**—A carrier must charge for transportation of freight and passengers reasonable rates. Such rates may be fixed within the limits of a State by its Board of Railroad Commissioners, who have power to prescribe reasonable rates to be charged by the carrier. But in fixing rates the Commission must act upon evidence disclosing all material facts and circumstances relating to the subject. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167.

The Railroad Commission of South Dakota having power to fix rates, the statute providing that the maximum rate of transportation for passengers and property within the State should not exceed three cents per mile, published its schedule of maximum charges. Plaintiff sought by suit in United States Circuit Court to procure an injunction to restrain the enforcement of the schedule. Evidence was taken upon the pleadings and after a hearing the court made its findings of fact, conclusions of law and rendered an opinion dismissing the bill and refusing an injunction. On appeal to United States Supreme Court *held* that the court below erred in failing to find the cost of doing the local business; that whether the rates fixed were reasonable depended on proof as to the gross receipts, and the cost of doing business so as to ascertain the net earnings of the carrier; that the true effect of a reduction in rates can be ascertained only by a comparison with the net earnings; that the court should have taken the proof with the aid of a competent and reliable master, general, or special one capable of making all needed computations so that the court in making its findings may have the

benefit of the master's work. Case remanded for fuller hearing before a master court below to proceed on master's report. *Ib.*

**Elements Considered to Determine Reasonable Rates.**— The duty conferred upon the Commission although it does not authorize it to fix rates requires it to determine the question of fact as to whether or not a rate complained of is or is not reasonable. The Commission, in passing upon this question, have been frequently commended by the court for their skill and absolute fairness to all parties and for the thoroughness of their investigations. In passing upon the question of reasonableness the Commission will consider all the elements involved. The following list will give some idea of the considerations which may be considered:

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| 1. Amount of through and local business. | 19. Operating expenses.                            |
| 2. Bonded debt.                          | 20. Other articles consumed.                       |
| 3. Bulk.                                 | 21. Population along the line.                     |
| 4. Character of commodity.               | 22. Proportion to local traffic.                   |
| 5. Comparison of rates.                  | 23. Relative reasonableness of rates.              |
| 6. Competition.                          | 24. Relative amount of through and local business. |
| 7. Consequences of rate changes.         | 25. Return loads.                                  |
| 8. Cost of production.                   | 26. Revenue.                                       |
| 9. Cost of service.                      | 27. Rates <i>prima facie</i> .                     |
| 10. Cost of local business.              | 28. Risk.  |
| 11. Distance.                            | 29. Special train service.                         |
| 12. Dividend on capital stock.           | 30. Storage capacity.                              |
| 13. Empty cars.                          | 31. Unsettling of rates.                           |
| 14. Fixed charges.                       | 32. Use to the public.                             |
| 15. Former rates.                        | 33. Value of freight.                              |
| 16. Geographical situation.              | 34. Volume of business.                            |
| 17. Initial expenses.                    | 35. Weight.  |
| 18. Market cost.                         |  |

**Testimony not Compulsory Prior to 1893.**— Prior to the act of February 11, 1893 (chap. 83, 27 Stat. 443), *supra*, there was no provision of law broad enough to secure immunity to a witness who gave testimony which might tend to criminate him. Section 860 of the United States Revised Statutes it was held



was not broad enough to secure immunity, because it does not provide immunity from prosecution. The section is as follows:

Sec. 860. "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *Provided*, That this section shall not exempt any party or witness from prosecution for perjury committed in discovering or testifying as aforesaid."

It was held, in *Counselman v. Hitchcock* (January, 1892), 142 U. S. 547, that this section was not broad enough to secure absolute immunity to a witness who might give evidence tending to incriminate himself. That the section could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court.

"It could not prevent," says BLATCHFORD, J., "the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Charles Counselman, in November, 1890, was summoned before the grand jury (U. S. Dist. Ct. No. Dist. Ill.) in a proceeding to investigate certain alleged violations of the Interstate Commerce Act, which he refused to answer. Among the questions were the following:

Q. Have you, during the past year, obtained a rate for transportation of your grain on any of the railroads coming to Chicago from points outside of this State less than the tariff or open rate? A. That I decline to answer on the ground that it might tend to criminate me.

Q. During the past year, have you received rates upon the Chicago, Rock Island and Pacific from points outside of the State to the city of Chicago at less than the tariff rates? A. Same answer.

Q. Do you know any person, corporation, or company who has obtained their transportation of grain from points or places in the States of Iowa, Nebraska, or Kansas to the city of Chicago over the Chicago, Rock Island and Pacific railroad during the past year at a rate and price less than the published and legal tariff rate at the time of such shipment? A. Same answer.

The court committed the witness for contempt for refusing to answer. Counselman sued out a writ of *habeas corpus*, which after hearing was discharged, and the prisoner was remanded to the custody of the marshal. On appeal, the decision of the Circuit Court discharging the writ was reversed, and the case remanded with instructions to discharge the appellant from custody. *Counselman v. Hitchcock* (January, 1892), 142 U. S. 547.

After the decision in the *Counselman* case Congress passed the act approved February 11, 1893 (chap. 83, 27 Stat. 443), *supra*, which took away the right to prosecute the witness on account of anything concerning which he might testify.

**Witness must Answer.**— The first case to reach the Supreme Court under the act of February 11, 1893, was *Brown v. Walker* (March, 1896), 161 U. S. 591. The statute was held sufficient. A witness subpoenaed to attend before the Interstate Commerce Commission and testify in a cause or proceeding growing out of an alleged violation of the Interstate Commerce Act must answer all pertinent questions, and will not be excused from testifying for the reason that the testimony may tend to criminate him because the statute as amended (act approved February 11, 1893) affords the witness absolute immunity against prosecution for or on account of any transaction, matter, or thing concerning which he may testify. *Brown v. Walker*, 161 U. S. 591.

The grand jury was investigating a charge against the Allegheny Valley Railroad Company for alleged discrimination in favor of the Union Coal Company by giving it rebates, drawbacks, or commissions on coal transported for it. The petitioner Brown was subpoenaed and testified that he was the auditor of the railroad company and it was his duty to audit the accounts of the company's officers as well as the accounts of the freight department. He was asked:

“Q. Do you know whether or not the Allegheny Valley Railway Company transported for the Union Coal Company during

the months of July, August, and September, 1894 and 1895, coal from any point on the Low Grade division of said railroad company to Buffalo at a less rate than the established rates in force between the terminal points at the time of such transportation? ”

He was also asked if he knew whether his company, during the year 1894, paid to the Union Coal Company any rebate, refund, or commission on coal transported by it whereby the coal company obtained transportation between said terminal points at a less rate than the open tariff rate. If you know, state amount of such rebates, drawbacks, or commissions paid, to whom paid, date of same, on what shipments, and all particulars within your knowledge of such transactions.

Witness refused to answer on the ground that such answer would tend to accuse and criminate himself. The court ordered the witness to show cause why he should not answer or be adjudged in contempt. The court, on the return of the order, overruled the objection of the witness and directed him to answer. Witness refused, and was adjudged in contempt, fined, and committed. He sued out a *habeas corpus*, and upon the hearing the writ was dismissed and the prisoner remanded. On appeal to the United States Supreme Court the judgment was affirmed. The court held that the statute afforded the witness complete immunity, not on account of any crime concerning which he might testify, but the immunity extended to any transaction, matter, or thing concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had. *Ib.*

**Books and Contracts must be Produced.**— The authority in the above case (*Brown v. Walker*, 161 U. S. 591), was followed under the provisions of the Elkins Act of February 19, 1903, in the case of *Interstate Com. Co. v. Baird*, 194 U. S. 25. The language of the Elkins Act is even broader than the language of the act of February 11, 1893, in that the Elkins Act includes within its purview not only the witness, but also the corporation complained against, or which possesses the books and papers sought to be used in evidence. It declares not only that the witness testifying shall not be excused, but also that *such corporation*



shall not be excused "from producing its books and papers." (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

In the *Baird* case the Supreme Court construed the law with reference to the scope of the powers of the Commission to inquire into the mode in which interstate commerce is conducted, and confirmed its authority to compel the production by the carrier not only of its books and papers, but of all contracts made by it which tend to show in what manner its traffic is conducted, the relations between carrier and carrier, and between the carrier and the shipper, and the rates charged and collected. It has been claimed that these contracts showed that the carriers were also miners and producers of coal. That they contained provisions whereby secret rebates and advantages were given to certain shippers (*i. e.*, to the carriers themselves), which were denied to others, which enabled the favored shippers to undersell their competitors, drive them out of business, and build up a monopoly in trade and commerce at the expense of the public and with the aid and participation of the carrier. Former investigations and inquiries by the Commission have frequently failed because the Commission was unable to secure the evidence upon which the trust, monopoly, or unjust discrimination could be established by legal proof.

The decision in the *Baird* case has established the right of the Commission to an inspection of these contracts, and pointed out the mode in which they may be put in evidence. It goes further and declares that "any person," under section 13 of the Interstate Commerce Act, may complain of anything done, or omitted to be done, under the act. It further declares that "no complaint shall be dismissed because of the absence of direct damage to the complainant." (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

**Mode of Securing Evidence — Coal Contracts.**—The method of procedure in the *Baird* case in which the Supreme Court directed that carriers must produce their books, papers, documents, and contracts to be used as evidence, grew out of a complaint made by William Randolph Hearst filed with the Interstate Commerce Commission November 2, 1902. Mr. Hearst was not a shipper or dealer in coal. He instituted his inquiry

as a citizen for his own benefit, and for the benefit of the general public, necessarily purchasers and consumers of coal. The object of the complaint was, assuming its allegations to be well founded, to secure a decision declaring that dealers in anthracite coal were guilty of an unlawful conspiracy and combination, and were guilty of unjust discrimination against shippers in the mining and sale of coal. The complaint was against ten carrying companies who were made defendants, to-wit: Philadelphia and Reading railroad, Lehigh Valley, Delaware, Lackawanna and Western, Central railroad of New Jersey, New York, Susquehanna and Western, Erie railroad, New York, Ontario and Western, Delaware and Hudson, Pennsylvania railroad, and Baltimore and Ohio. It was alleged that these carriers were engaged in interstate commerce in carrying coal from one State into other States. That in violation of the provisions of the Interstate Commerce Act they charged and exacted unjust and unreasonable rates for carrying coal from Pennsylvania into New York and New England and other States, and subjected producers and consumers of coal to undue and unreasonable prejudice and disadvantage, to the disadvantage of such producers and consumers, and to the undue and unreasonable preference and advantage of defendants in violation of sections 1 and 3 of the act. That the rates of transportation charged by defendants were unreasonable and unjust, and unjustly discriminated against the interests of dealers and consumers in violation of section 2, and that defendants violated section 4 of the act by charging more for a short than a long haul. That defendants, in the absence of any trust agreement, were respectively natural competitors, being substantially parallel lines, and that six of the defendant carriers pooled their freight in violation of section 5 of the act. Complainant prayed that defendants be compelled to answer the charges, and for an order commanding them to desist and cease each and every violation of the act.

Defendants filed their answers and the Commission proceeded to inquire as to the truth of the charges. In the course of the investigation defendants were asked to produce the contracts referred to in the complaint and to answer certain questions in relation thereto. Defendants, their officers, agents, and servants refused to answer the questions or produce the contracts, and

their counsel denied the power and authority of the Commission to compel them to do so.

The Commission then prepared a petition to the Circuit Court of the United States for the southern district of New York, and requested the Attorney-General of the United States to present it pursuant to the provisions of the Elkins Act of February 19, 1903. The Attorney-General thereupon instructed the United States District Attorney for the southern district of New York to present the petition and procure an order directing the witnesses to attend before the Commission, answer the questions, and produce the contracts, to be marked in evidence.

Defendants claimed that the witnesses could not be compelled to testify or produce the contracts and claimed immunity under the Fourth, Fifth, and Tenth Amendments to the Constitution. Defendants claimed further that the contracts (which were produced for inspection merely) were not in any way relevant to the subject of the inquiry.

The court dismissed the petition solely on the latter ground that the contracts, in the judgment of the court, contained no material or relevant testimony, as they related only to the sale of coal in the State of Pennsylvania, which was a matter of domestic trade and did not concern interstate commerce. An appeal was taken directly to the Supreme Court under the "Expedition Act" of February 11, 1903, authorizing such an appeal in any case in which the United States is complainant or which is brought under the direction of the Attorney-General of the United States. The order of the Circuit Court was reversed (BREWER, J., alone dissenting) on the ground that the contracts sought were material and necessary in aid of the inquiry, to enable the Commission to obtain full and complete information upon which to frame its judgment and promulgate its orders in the discharge of its duties under the act.

**Coal Contracts Relevant.**—As to the relevancy of the contracts to the inquiry pending the court held that the testimony disclosed the fact that the carriers who made the contracts were also miners and owned and controlled the mines from which the coal which they carried was produced. That, while some of the coal was sold in Pennsylvania, much of it was carried to



tide water and sold in other States. That the parties who made the contracts were officers of the carrying companies and were also officials of the mining companies, and while the contracts were in form for purchases of coal "their real purpose was to fix a rate for transportation." That the rate of compensation to the carrier was made to depend upon the price of coal in the open market. That if the carrier received its freight from a sum retained by the coal companies then whether they received more or less than the published rate depended on the price of coal. That the evidence showed that the coal was paid for at tide water by the consignees (who were companies owned by defendant carriers) on the basis of 65 per cent. of the general average price received at tide water by the sale of sizes above pea coal, leaving 35 per cent. for the purchaser, from which he must pay the transportation charges and cost of sale. In other words when the carrier, which was also the miner and producer, sold its coal to its own companies designated in the contract, it retained 65 per cent. of the market price of the commodity as the price it charged for the coal. This would leave 35 per cent. to be paid to the carrier as the cost of transportation. Thirty-five per cent. of the selling price of coal at the time the complaint was filed was the freight rate which the consignee paid the carrier. The evidence showed that this sum which the companies paid the carrier for freight was less than the published rate. If this evidence was correct then the defendants charged their own companies less for carrying their coal than they charged competing dealers and coal merchants who were not interested in the companies favored by the carrier and named in its contracts. It would thus appear that the amount paid for freight by the favored shipper "would work a discrimination against coal companies not having special contracts with the carrier, and who were obliged to pay the full published tariff rate. On the other hand, if the favored companies paid the full rate from their 35 per cent., they would lose money, and as they were owned by the railroad companies the loss would be ultimately theirs and not the coal companies."

The court held, accordingly, that while the Commission might ultimately find that the contracts did not fix the compensation received by the carriers and that the companies referred to in the

contracts paid the published tariff freight rate and that the loss, if any, is made up on other business, the contracts were nevertheless relevant to the matters which were the subject of the inquiry, whether the Commission finally established the issue made, one way or the other. (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

**Coal Trust Case — Constitutional Objections Untenable.—**

The court in the *Baird* case held that the constitutional objections raised were wholly untenable. The provisions of the Elkins Act of February 19, 1903, re-enacts in an amplified form the provisions of section 12 of the Commerce Act with respect to self-incriminating testimony. The act declares that "the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation from producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding." In construing this clause, which is broader than the provisions of section 12, in that it embraces also the corporation required to produce books or papers, the court followed the previous decisions construing the language in section 12. *Brown v. Walker*, 161 U. S. 591; *Interstate Com. Co. v. Baird*, 194 U. S. 25.

With respect to the Fourth Amendment securing immunity from unreasonable searches and seizures the court followed the ruling in *Boyd v. United States*, 116 U. S. 616, and quoted from the opinion of Justice BRADLEY in that case as follows: "Breaking down a house and opening boxes and drawers are circumstances of aggravation, but any forcible or compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment."

"In this regard," says Mr. Justice DAY, "the Fourth and Fifth Amendments run almost into each other." And see *Adams v. People of State of New York* (192 U. S. 585), decided at this term. As we have seen the statute protects the witness from such use of testimony as will result in his punishment for crime

or the forfeiture of his estate. (April, 1904.) *Interstate Com. Co. v. Baird*, 194 U. S. 25.

**Contempt.**— A proceeding by the Interstate Commerce Commission, whereby it invokes the aid of a Circuit Court of the United States, to compel witnesses subpoenaed before the Commission to testify and produce books and papers, is a judicial proceeding to which the jurisdiction of the Federal court extends, and a refusal on the part of a witness to obey an order of the court directing him to testify or answer questions or produce books, papers, and documents, may be punished by contempt proceedings. *Interstate Com. Co. v. Brimson*, 154 U. S. 447.

**Immunity under Sherman Act.**— It has been held that the immunity secured to witnesses under the act of February 11, 1893, applied only to proceedings instituted under the Interstate Commerce Act of February 4, 1887, and had no application to proceedings instituted under the Sherman Act of July 2, 1890. *Foot v. Buchanan*, 113 Fed. Rep. 156.

Under the act of February 25, 1903, however (Laws 1903, chap. 755), immunity is extended to witnesses testifying in proceedings instituted under the Sherman Act as well as under the Interstate Commerce Act. See *post*, page 297.

**Immunity — Corporations.**— The act of February 11, 1893, does not grant immunity from indictment and prosecution to a corporation even though its officers or agents have been compelled to appear before the grand jury and testify to facts which would tend to incriminate it or produce books and papers of the corporation bearing upon the offense of which it is charged. The immunity of the statute extends to witnesses who give testimony and cannot be extended to include the corporation the witness represents. *In re Pooling Freights*, 115 Fed. Rep. 588.

**Trial by Jury — Contempt.**— In a proceeding to punish a defendant for contempt of court for a violation of an injunction order the defendant is not entitled to a jury trial. The power of a court to make an order carries with it the power to punish for a disobedience of that order, and such inquiry has always been the special function of the court. To submit the question



of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. *In re Debs*, 158 U. S. 654.

If the court upon inquiry finds that its orders have been disobeyed it may proceed under section 725 of the Revised Statutes, which grants power "to punish by fine or imprisonment \* \* \* disobedience \* \* \* by any party \* \* \* or other person to any lawful writ, process, order, rule, decree, or command," and enter the order of punishment complained of. A finding of fact in a proceeding to punish for contempt is not open to review in an appellate court on *habeas corpus* proceedings. *Ib.*

**Trial by Jury.**— A proceeding instigated by the Interstate Commerce Commission under the twelfth section of the Interstate Commerce Act, to compel witnesses to produce books and testify before it, in which they invoke a Circuit Court of the United States to use its process to compel such testimony presents a case or controversy within the judicial power of the United States. The issue in such a controversy, as to whether defendants in such a proceeding are under a duty to answer the questions propounded to them, and to produce the books, papers, and documents called for, presents no issue of fact, but solely a question of law, and is not a proceeding in which the defendant is entitled to a jury trial. In such a proceeding defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him as an officer to perform a ministerial duty. The power of the court to punish witnesses for contempt does not arise until the issue of law is decided adversely to defendant, and an order has been made requiring him to testify. Disobedience of the order may be punished as a contempt. In matters of contempt a jury is not required by "due process of law." *Interstate Com. Co. v. Brimson*, 154 U. S. 447.

**Depositions under United States Revised Statutes.**— The mode in which depositions may be taken before the Interstate Commerce Commission is specially prescribed by section 12, *supra*. An action before a Federal court when a party sues independent of the Commission to enforce his rights for a violation of the Interstate Commerce Act, as to this mode of proof, would be governed by the United States Revised Statutes. The proof

must be either by oral testimony or upon depositions in actions at law, or in actions triable by jury. The provisions of the Federal statute in this regard are as follows:

**Sec. 861. Actions at Law.**— The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided.

**Sec. 862. Suits in Equity.**— The mode of procedure in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.

**Sec. 863. Depositions.**— The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

**Sec. 914. State Court Practice.**— The practice, pleadings and forms and modes of proceeding in civil cases, other than equity

and admiralty cases, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

**Depositions under State Laws — Act of March 9, 1892.**— The mode of taking depositions was further provided for by an act approved March 9, 1892 (27 Stat. 7), entitled “An Act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States.” The act declares “that in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held.”

*Held*, that the act of 1892 does not modify section 861 of the United States Revised Statutes or create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions or testimony in writing. Nor does such act supplement the provisions of section 914, United States Revised Statutes. The courts of the United States are not given discretion to take depositions not authorized by Federal law, but in respect to depositions thereby authorized to be taken, they may follow the Federal practice in the manner of taking or that provided by the State law. *Hanks Dental Assn. v. Tooth Crown Co.* (May, 1904), 194 U. S. 303.

In the case cited, an action for damages for the infringement of a patent right, the sole evidence of infringement was found in the deposition of the president of the Hanks Dental Association, the plaintiff in error. This deposition was taken under an order of the United States Circuit Court, pursuant to the laws of the State of New York, section 870 *et seq.* of the New York Code of Civil Procedure, which declares that “the deposition of a party to an action pending in a court of record or a person who expects to be a party to an action about to be brought \* \* \* may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial as prescribed in this article.” The taking of the



deposition was objected to at every stage. Plaintiff below had a verdict. A writ of error was taken to the United States Circuit Court of Appeals which certified to the Supreme Court the following question:

“Q. Was the order of the circuit court, directing the president of the Hanks Dental Association, the defendant in that court, to appear before a master or commissioner appointed pursuant to the provisions of section 870 *et seq.* of the Code of Civil Procedure of the State of New York, valid and authorized under the act of March 9, 1892.”

The Supreme Court after reviewing the law and authorities (*United States v. Fifty Boxes*, 92 Fed. Rep. 601; *Nat. Cash Reg. Co. v. Leland*, 77 Fed. Rep. 242; *Texas & Pacific R. Co. v. Wilder*, 92 Fed. Rep. 953; *Shellabarger v. Oliver*, 64 Fed. Rep. 306; *Despeaux v. Pennsylvania Railroad*, 81 Fed. Rep. 897; *Zych v. American Car & Foundry Co.*, 127 Fed. Rep. 723; *Smith v. Northern Pacific Railroad*, 110 Fed. Rep. 341; *Camden Railway v. Stetson*, 177 U. S. 172; *Union Pacific v. Botsford*, 141 U. S. 250; *Luxton v. North River Bridge Co.*, 147 U. S. 337; *Tabor v. Indianapolis Journal*, 66 Fed. Rep. 423; *Seeley v. Kansas City Star*, 71 Fed. Rep. 554; *Ex parte Fiske*, 113 U. S. 713) answered the question in the negative, and held that the court had no power to subject the party to such an examination. *Ib.*

§ 13. Complaint to Commission, how Made — Investigations, how Conducted.— That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the

same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

**Complaints by State Railroad Commissions.**— Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

**Object and Scope of Section 13.**— This section defines the mode of instituting proceedings before the Commission, and defines what the petition of complainant must show, and power of the Commission to compel a written answer by the carrier. It makes it their duty to investigate any complaint properly brought before the Commission by any person, whether such complainant shall or shall not be able to establish direct damage or not. It makes it the duty of the Commission to institute any inquiry or investigation which it may deem proper of its own volition. It provides for reparation by an offending carrier, whereby it may be relieved from liability or obligation to comply with any order made against it. It defines the mode of procedure before the Commission and makes special provisions for com-

plaints filed by a Railroad Commission or Railroad Commissioners of any State.

**Who may Invoke Enforcement of the Act — "Any Person."**

— The duty which the act imposes on the Interstate Commerce Commission is a public duty. It is a duty which involves the constitutional rights and privileges of the citizen. "Any person" may invoke the Commission to discharge that duty, which the law imposes, who files with it a proper petition or complaint setting forth a violation of the act, or of any of its provisions, whether that person be directly interested as a shipper or not; or whether the petitioner has or has not sustained any direct damage (April, 1904). *Interstate Com. Co. v. Baird*, 194 U. S. 25.

In the case cited, the petition was filed by William Randolph Hearst, against certain carriers engaged in carrying and transporting coal. The petitioner was not a shipper nor directly interested in shipping, mining, or selling coal. He did not claim to have suffered direct damage, but complained as a citizen to compel the carriers referred to in his petition to cease and desist from violating the various provisions of the Interstate Commerce Act, as set forth in his complaint. Defendants raised the question as to the right of the complainant to institute any proceeding, investigation, or inquiry under the act. On this point the court said: "It is provided in the act to regulate commerce, section 13, that 'Any person, firm, corporation, etc., complaining of anything done, or omitted to be done, by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition,' etc. And certain procedure is provided for, and (said Commission) 'may institute any inquiry on its own motion, in the same manner and to the same effect as though complaint had been made,' and the section concludes: 'No complaint shall, at any time be dismissed because of the absence of direct damage to the complainant.'"

"In the face of this mandatory requirement," says Mr. Justice DAY, "that the complaint shall not be dismissed because of the want of direct damage, to the complainant, no alternative is left the Commission but to investigate the complaint if it presents matter within the purview of the act and the powers granted to the Commission." *Ib.*



§ 14. **Report of Commission, how Made.**— That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

**Report, how Published.**— The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports. (*As amended March 2, 1889.*)

**Object and Scope of Section 14.**— This section provides for the reports which the Commission must make, and the findings of fact upon which the conclusions arrived at in any report are based, and declares that such findings shall be *prima facie* evidence of the facts found. The section also declares how the reports of the Commission may be published, and makes official reports evidence without further authentication.

**Commission are Experts.**— Whether the great Commission to which Congress has primarily intrusted the important duty imposed upon it, is or is not to be regarded as technically experts is not open to question, in view of the fact that they are authorized to execute and enforce, through the Federal courts, the provisions of the Interstate Commerce Act. The findings of that body are declared to be *prima facie* evidence of the matters therein stated, and are entitled to the highest consideration, and if its orders based thereon are in conformity with the law they must be enforced. *Interstate Com. Co. v. Louisville*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

**Burden of Proof — Findings of Commission Prima Facie Evidence.**— The findings and conclusions of the Interstate Commerce Commission, upon the testimony taken by it, are *prima facie* evidence of the facts therein contained, and are presumed to be correct. A finding that charges made by the carrier are unreasonable and unjust throws upon the carrier the burden of proof to sustain its claim that such findings are erroneous. *Interstate Com. Co. v. Louisville Railroad*, 118 Fed. Rep. 613 (July, 1902, Cir. Ct. So. Dist. Ga.).

§ 15. **Commission to Notify Carrier of Violations of Law — Compliance of Carrier, Effect of.**—That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from

such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

**Object and Scope of Section 15.**—This section provides for the judgments and orders which the Commission may make as a result of its inquiry and investigation. If it finds that the carrier has violated any of the provisions of the statute after a hearing, upon legal evidence, it is authorized to issue a mandatory order directing the carrier “to cease and desist from such violation.” If damage has been sustained the Commission may require reparation to be made. It also provides that the carrier be relieved from liability upon compliance with the order.

**§ 16. Disobedience of Carrier, how Punished.**—That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary



way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue [**Power of Court to Issue Injunction**] a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same.

And in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue [**Mandamus — Attachment**] writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, [**Per Diem Penalty not to Exceed \$500**] to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court.

**Appeal to United States Supreme Court.**— When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before

said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable.

Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

**Trial by Jury.**— If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of



said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid.

At the trial of the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties [**Jury may be Waived**] shall waive a jury in writing then the court shall try the issues in said cause and render its judgment thereon.

If the subject in dispute shall be of the value of two thousand dollars or more either party may [**Appeal to U. S. Supreme Court**] appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session. (*As amended March 2, 1889.*)

§ 16 **Supplemented — Act to Expedite Cases, Approved February 11, 1903.**— The method of procedure in the Federal Courts in suits and hearings under the Interstate Commerce Act, and the Sherman Anti-Trust Law (Act of July 2, 1890) are regulated by the provisions of an Act of Congress, approved February 11, 1903 (chap. 544), entitled “An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2, 1890, entitled ‘An Act to protect trade and commerce against unlawful restraints and monopolies,’ ‘An Act to regulate commerce,’ approved February 4, 1887, or any other acts having a like purpose, that may hereafter be enacted.” The provisions of this Supplemental Act of February 11, 1903, are as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” approved July second, eighteen hundred and ninety, “An Act to regulate commerce,” approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. [**Preference over Other Cases.**] Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or

more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

**Appeal Directly to Supreme Court.**—§ 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law. (*Act of February 11, 1903, § 2.*)

**Object and Scope of Section 16.**— This section provides for the enforcement of any order or requirement made by the Interstate Commerce Commission, in conformity with section 15. The Commission is not clothed with judicial powers, and cannot for that reason compel obedience to its mandates. But it may invoke the aid of a Federal court and enforce its orders through such tribunal. The method of procedure by the Commission is prescribed, and jurisdiction and plenary powers are conferred upon the court to take cognizance of such proceedings and enforce them, when sustained by legal mandate. The findings of fact made by the Commission are made *prima facie* evidence in the proceeding before the Circuit Court of the United



States, and the burden of proof is upon the defendant who assumes to disobey the order of the Commission.

The powers conferred on the court embrace authority to issue writs of attachment, injunction, and "other proper process, mandatory or otherwise," and power to punish for contempt. It also provides the procedure on appeals, either to the Circuit Court of Appeals or directly to the Supreme Court of the United States. In this regard the provisions of the act of February 11, 1903, to expedite cases under this section, and the provisions of the Elkins Act of February 19, 1903, add to the force and efficiency of the provisions of this section by making it practicable, and the remedy speedy and effective. Provision is made also for jury trials where the right to a jury trial exists, under the Constitution, and has not been waived.

**Findings of Fact by Commission.**— The findings of fact made by the Interstate Commerce Commission in proceedings taken before it to secure an order forbidding the carrier to charge unjust and unreasonable rates, are not conclusive upon the court, upon a petition of the Commission for an injunction to enforce its order after refusal by the carrier to obey it. Such findings are authorized by the statute, which in terms declares that they shall be *prima facie* evidence only of the facts found. The legal effect of such findings would throw the burden of proof on carrier in a proceeding for an injunction in the Federal court, where the carrier opposes the application and denies the facts found against it. *Interstate Com. Co. v. Lehigh Railroad*, 49 Fed. Rep. 177; *Kentucky Bridge Co. v. Louisville Railroad*, 37 Fed. Rep. 567.

No greater force can be given to the findings of the Commission than is given by the statute, which authorizes such findings and confers the power and authority to make them. *Ib.*

**Appeals Directly to Supreme Court.**— Prior to the legislation of 1891, creating the United States Circuit Court of Appeals, there was no intermediate appellate tribunal, and appeals were required to be taken from Circuit Courts of the United States directly to the Supreme Court, when the subject in dispute was of the value of \$2,000 or more.

Since the establishment of the United States Circuit Court of Appeals an appeal lies to that court, except that under the provisions of the act of February 11, 1903, and the Elkins Act of February 19, 1903, appeals must be taken directly to the Supreme Court of the United States in cases where the United States is complainant, and an appeal to the Circuit Court of Appeals in such a case will not lie.

Under section 7 of the Sherman Act the limitation of \$2,000 is no longer necessary to enable a party to sue, or to appeal, either to the Circuit Court of Appeals, or to the Supreme Court of the United States. Such an action may be brought and an appeal taken irrespective of the amount involved. *Montague v. Lowry*, 193 U. S. 35.

See also authorities under section 9, *ante*, page 171.

**Appeals to Supreme Court Prior to 1891.**— Under section 16, prior to the establishment of the United States Circuit Court of Appeals, an appeal would lie in a suit by the Interstate Commerce Commission, to enforce its order from a Circuit Court of the United States to the United States Supreme Court, if the subject in dispute shall be of the value of \$2,000 or more.

If the action was one triable by jury, or if a jury trial has been duly waived, such appeal was required to be taken within twenty days from the day of the rendition of the judgment of the Circuit Court. Where the suit was to enforce an order of the Commission, for refusal to afford complainant "the same equal facilities, as are afforded to any other connecting road," and for other relief, the Circuit Court dismissed the bill for want of equity. An appeal was taken by complainant directly to the Supreme Court. *Held*, that the appeal would not lie unless it clearly appeared that the subject in dispute shall be of the value of \$2,000. Appeal dismissed. *Little Rock & Memphis v. East Tennessee*, 159 U. S. 698 (December, 1895), citing *Interstate Com. Co. v. Atchison Railroad*, 149 U. S. 264.

**Jurisdiction over All Carriers for Breach by One — Proper District.**— A number of railroads were forbidden by an order of the Interstate Commerce Commission from enforcing rates found to be illegal, for transportation between Pueblo, Col., and San Francisco, Cal. The Commission found that the freight was car-

ried "under a common control, management, or arrangement for a continuous carriage or shipment." The order was violated in the district of Colorado, by the Southern Pacific having its principal office in California. The suit was brought in the district of Colorado. Section 16 of the act provides that suit by the Commission to enforce its order may be instituted "in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen." *Held*, that where all the roads operated under a common control in making the forbidden rates, the act of one in the district where the disobedience of the order happens is the act of all, and the violation by all took place in the district of Colorado as well as in the district of California. *Interstate Com. Co. v. Southern Pacific*, 74 Fed. Rep. 42 (May, 1896, Cir. Ct. Dist. Colo.).

All doubt as to the proper district in which suit may be brought is removed by the provisions of section 3 of the Elkins Act, which declares that "when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State." See Elkins Act, section 3, *ante*, page 137.

See also authorities under "Jurisdiction" under section 9, *ante*, pages 154, 155.

**Order of Commission — Terminal Charges — When not Enforced.**— An order of the Interstate Commerce Commission declared that terminal charges of a carrier for the delivery of live stock to the stockyards in Chicago were unjust and unreasonable, and a violation of the Interstate Commerce Act. The court below refused to enforce the order of the Commission upon the ground that the claim that the charges were unreasonable could not be sustained. On appeal, *held*, that the through rate existing prior to June 1, 1894, was presumed to provide compensation for services in making delivery at the stockyard, and while the judgment appealed from should be affirmed, yet the Commission should not be prevented from proceeding to correct unreasonableness in the rates as to territory to which the reduction did not apply. *Interstate Com. Co. v. Chicago, B. & Q.*



*R. Co.*, 186 U. S. 320. Citing *Covington Stockyard Co. v. Keith*, 139 U. S. 128; *Walker v. Keenan*, 73 Fed. Rep. 755.

**Parties.**— In a proceeding by the Interstate Commerce Commission under section 16 to enforce an order made by the Commission directing the carrier to desist and cease from charging rates declared to be in violation of the act, the Commission need not necessarily join as a party to the proceeding another carrier, who has made the forbidden rate, jointly with the defendant. Such carrier is a proper, but not a necessary, party. *Interstate Com. Co. v. Texas Railroad*, 52 Fed. Rep. 187 (October, 1892, Cir. Ct. So. Dist. N. Y.).

**Damages — Trial by Jury.**— If a shipper seeks redress before the Interstate Commerce Commission for charges paid to the carrier in excess of what was paid by other shippers for a like service under section 2 of the act, and procures an order from the Commission directing the carrier to desist from exacting such unlawful charges, he may enforce the order through the Commission by a suit in equity by injunction under section 16. But if the amount of the excessive charges are proved and the Commission makes an order directing the carrier to make reparation and restitution, and to refund the amount by way of damages, so much of the order as directs restitution cannot be enforced in the equity action. The portion of the order directing payment of damages can be enforced, if at all, only in an action at law in which the carrier is entitled to a jury trial. *Interstate Com. Co. v. Western New York Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

**Remedy by Injunction.**— A shipper who has been discriminated against and has been obliged to pay charges on shipments in excess of what the carrier charged other shippers for a like service, is not obliged to seek a remedy at law to recover the excessive payments by way of damages. He may seek redress before the Interstate Commerce Commission and secure an order directing the carrier to cease from exacting the unlawful charges and enforce the order by injunction in a suit in the Circuit Court of the United States. *Interstate Com. Co. v. Western New York Railroad*, 82 Fed. Rep. 192 (July, 1897, Cir. Ct. West. Dist. Pa.).

If the remedy sought is by injunction in equity, the court has no power to enforce so much, or such parts, of the order of the Commission as directs reparation, or refunding to claimants, by way of damages, the excessive charges proved before the Commission. If such orders directing reparation are enforceable at all, they must be enforced in an action at law in which the carrier will be entitled to a jury trial. So held, where the Commission found the amount of the excessive charges on shipments of oil from Titusville and Oil City, Pa., to New York and elsewhere. *Ib.*

§ 17. **Procedure before Interstate Commerce Commission.**— That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas. (*As amended March 2, 1889.*)

**Object and Scope of Section 17.**— This section makes the procedure before the Commission analogous to proceedings in a

court of record as near as may be by declaring that it shall have an official seal of which the courts will take judicial notice. Parties may appear before it in person or by attorney. Forms used before the Commission shall conform, "as nearly as may be, to those in use in the courts of the United States." The Commission may make rules of procedure, and amend or modify them. It may amend or modify its orders. It may administer oaths or affirmations to witnesses, and may issue and sign subpoenas. Its records shall be public records, accessible to any person in like manner as the records of a court.

**§ 18. Salary of Commission — Fees and Expenses.**— That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission. (*Amended March 2, 1889.*)



**Object and Scope of Section 18.**— This section provides for the salaries of the Commissioners. Each Commission has power to appoint a secretary, and to employ and fix salaries of employees. Witness fees and mileage are the same as are allowed in the Federal courts.

**Disbursements of Commission.**— Section 18 declares that “all expenses of the Commission \* \* \* shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Chairman of the Commission.” By the Appropriation Act for the same (Supp. Rev. Stat. (2d ed.) 698) it is provided “that hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury.” *Held*, that the Secretary of the Interstate Commerce Commission was entitled to pay for moneys expended for telegrams sent by the Commission in the discharge of its duties upon presentation of vouchers showing cost of each telegram, dates, number of words, persons from and to whom sent, and charge for each message transmitted in the form prescribed by statute without furnishing copies of such telegrams, when it appears that such messages are so far confidential as to justify a refusal to disclose their contents. *United States v. Mosely*, 187 U. S. 322.

**§ 19. Sessions of Commission, where Held.**— That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

**Object and Scope of Section 19.**— This section provides for the sittings and sessions of the Commission, and the location of

its principal office, which shall be in the city of Washington. But it may, by one or more of its Commissioners, sit anywhere in the United States.

**§ 20. Carrier must Make Annual Reports — Contents — Uniformity of Accounts.**— That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail —

The amount of capital stock issued;

The amounts paid therefor, and the manner of payment for the same;

The dividends paid, the surplus fund, if any, and the number of stockholders;

The funded and floating debts and the interest paid thereon;

The cost and value of the carrier's property, franchises, and equipment;

The number of employees and the salaries paid each class;

The amounts expended for improvements each year, how expended, and the character of such improvements;

The earnings and receipts from each branch of business and from all sources;

The operating and other expenses;

The balances of profit and loss;

And a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet.

Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require;

And the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

**§ 20 Supplemented — Act of March 3, 1901 — Monthly Reports of Accidents.**— The provisions of the Interstate Commerce Act with respect to annual reports required to be made by carriers annually has been supplemented by an Act of Congress (chap. 866), approved March 3, 1901, requiring monthly reports of railroad accidents. The Act is entitled "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission." The provisions of this supplementary Act are as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* It shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, [**Monthly Reports of Accidents**] a monthly report, under oath, of all collisions of trains or where any train or part of a train accidentally leaves the track,



and of all accidents which may occur to its passengers or employees while in the service of such common carrier and actually on duty, which report shall state the nature and causes thereof, and the circumstances connected therewith.

§ 2. **Penalty, Misdemeanor.**— That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor and, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same.

§ 3. **Reports not to be Used in Evidence.**— That neither said report nor any part thereof shall be admitted as evidence or used for any purpose against such railroad so making such report in any suit or action for damages growing out of any matter mentioned in said report.

§ 4. **Forms of Reports.**— That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports in the foregoing section provided.

**Object and Scope of Section 20.**— The provisions of this section are extremely important. It furnishes the basis of data, and information as to the mode in which the commerce of the country is conducted, and gives the Commission power to compel all interstate carriers to make reports to it from time to time. These reports will, if properly prepared, reveal the financial condition of the corporation. The financial operations of the carrier must be furnished annually. Agreements or contracts

among carriers may also be required to be produced for the inspection of the Commission. A uniform system of accounts by carrying corporations may also be required under this section.

Similar powers to those conferred by section 20 are now conferred upon the Commissioner of Corporations under the control of the Secretary of Commerce and Labor as to all corporations doing interstate business, except common carriers. In other words, the powers of section 20 of the Interstate Commerce Act, which relates exclusively to carriers, has been extended to the Commissioner of Corporations, with respect to all other corporations, joint-stock companies, or industrial combinations engaged in interstate commerce. For the provisions of law governing the power of the Commissioner of Corporations, see chapter III, *post*.

**Report, when not Compulsory — Domestic Commerce.**— The Commission, under section 20, can require reports only from carriers engaged in interstate commerce. A railroad wholly within one State which ships freight destined to other States upon local bills of lading only, under a special contract of carriage limited to its own line, which does no business on through rates, nor divide through charges with connecting carriers, nor assume any obligation to or from them, is not engaged in interstate commerce, and a *mandamus* will not lie to compel it to file any report with the Interstate Commerce Commission under section 20 of the act. *United States ex rel. Interstate Com. Co. v. Chicago Railroad*, 81 Fed. Rep. 783 (June, 1897, Cir. Ct. West. Dist. Mich. S. D.).

**§ 21. Commission to Make Annual Reports to Congress.**— That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation re-

lating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission. (*As amended March 2, 1889.*)

§ 22. **Free or Reduced Rates — Excursions — Mileage — Commutation Rates — Remedies Cumulative.**— That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the



provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act. (*As amended March 2, 1889.*)

*Provided further*, That nothing in this act shall prevent the issuance of joint interchangeable [**5,000 Mile Tickets**] five-thousand mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles.

But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint inter-

changeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. [Penalties.] The provisions of section ten of this act shall apply to any violation of the requirements of this proviso. (*Added by Laws 1895, chap. 61; approved February 8, 1895.*)

**Object and Scope of Section 22.**— This section is designed to regulate the conduct of interstate commerce with respect to free transportation, and special rates when a reduced rate fare may be charged. The object sought is to place all patrons on an equality. The only instances in which the carrier may lawfully depart from the published tariff rates are regulated and defined in this section.

One of the most important parts of the section is that which declares that all the remedies afforded to the shipper or person injured by any violation of the provisions of the act shall be cumulative, and not exclusive. This provision is most important in view of the fact that the Interstate Commerce Act is, in some respects, a penal statute, and strict construction of its provision might deprive it of its beneficial interests and purposes. It was intended partly as a penal, partly as a remedial, statute, and was primarily designed to afford a remedy to shippers and persons who are compelled to deal with the carrier. Congress, in enacting section 22, has expressly declared all remedies existing at common law, or by statute, shall not be altered or abridged, but that the remedies afforded by the Interstate Commerce Act "are in addition to such remedies."

**Remedy Cumulative.**— The Interstate Commerce Act created no new right in the shipper. At common law the common carrier was bound to receive and transport all goods offered on receiving reasonable compensation for such carriage. The carrier at common law could not lawfully enforce unreasonable charges. The difference in the obligation of a common carrier and an individual is, that the former has undertaken a duty to the public. And that duty imposed upon him the obligation

to carry for all to the extent of his capacity without unjust or unreasonable discrimination, either in charges or in the facilities for actual transportation. SPEER, D. J., So. Dist. Ga., in *Tift v. Southern R. Co.*, 123 Fed. Rep. 789; citing *Atchison R. Co. v. Denver R. Co.*, 110 U. S. 667; *Interstate Com. Co. v. Cincinnati R. Co.*, 167 U. S. 479.

This common-law obligation of the carrier is even stronger upon carriers who receive valuable franchises from the public. The universal reliance of the public on the instrumentalities of modern commerce renders their operation indispensable to the existence of modern social life. The act of Congress, in so far as it prohibits and forbids the carrier from imposing unjust and unreasonable rates, is an express adoption of the rules of the common law in this regard. By embodying this common-law right in the statute, Congress created no new right in the shipper, but provided for him a remedy in the Federal courts. The object of Congress was to facilitate interstate commerce, and restrict the arbitrary power of the common carrier. *Ib.*

The intention of the act was not to deprive the shipper of any right which he might have had or invoked in any court prior to the passage of the act. The intention clearly was to facilitate the shipper in securing such right by creating new and special remedies for that purpose. And these remedies were intended to supplement and not to supplant the remedies which existed before the act of Congress. These remedies being supplemental to those formerly existing must be deemed to be cumulative and not exclusive, and section 22 of the act expressly so declares, creating a remedy by *mandamus* which is particularly designated as a cumulative remedy. *Ib.*

The section cited also declares broadly that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are *in addition* to such remedies." Every remedy, therefore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by the act, the provisions of which are extended by the act of February 19, 1903, so as to authorize the government of the United States, at the instance of the Attorney-General of the United States, either of his own motion



or at the request of the Interstate Commerce Commission, to enforce the remedies of the act by proceedings instituted by the United States District Attorney in the proper locality. And such new remedies under the act of February 19, 1903, are retroactive and apply to actions or proceedings which were pending at the time of the passage of the amending act. *Missouri Pacific R. Co. v. United States*, 189 U. S. 274.

**Free Passes.**— A carrier who grants a free pass or otherwise furnishes free transportation over its interstate lines, except upon the terms and conditions and in the manner provided in section 22 of the act, is guilty of a misdemeanor. The granting of such passes is unlawful and in violation of the provisions of sections 2 and 3 of the act. *In re Charge to Grand Jury*, 66 Fed. Rep. 146 (February, 1895, Dist. Ct. No. Dist. Cal.).

The provisions of section 22 of the act authorizing free passes or reduced rates to particular persons and to officers and employees of the carrier engaged in interstate commerce do not include the families of such persons, and a receiver of the carrier's road will be instructed that he is not authorized to give such passes. *Ex parte Koehler*, 31 Fed. Rep. 315 (July, 1887, Cir. Ct. Dist. Oregon).

**Party-rate Tickets.**— The Interstate Commerce Act was designed to secure equality among shippers and passengers, but was not intended to prevent competition between different carriers, or to interfere with customary arrangements among carriers for reduced fares in consideration of increased mileage where the discrimination was not unjust. Nor to ignore the principle that one can sell at wholesale cheaper than at retail. A discrimination to fall within the statute must be "unjust;" a discrimination must be "unfair" or unreasonable.

"Party-rate Tickets," whether regarded as commutation tickets or not, whereby the carrier gives to ten or more persons a reduced rate, do not constitute unjust discrimination or undue or unreasonable preference. Theatrical companies, or any number of persons exceeding ten, may have the benefit of this reduced rate. "A commutation ticket is issued to induce people to travel more frequently; party-rate tickets are issued to induce more people to travel." "Party-rate tickets are lawful, and

their sale by a competing road is not a violation of the Interstate Commerce Act." *Interstate Com. Co. v. Baltimore Railroad*, 145 U. S. 263.

§ 23. **Remedy by Mandamus to Move Traffic or Furnish Cars.** — That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement. (*New section added March 2, 1889, being section 10 of chap. 382; approved March 2, 1889.*)

**Object and Scope of the New Section.**— The purpose of the section added to the Interstate Commerce Act by the act of March 2, 1889, was to give the shipper an additional summary and effective remedy by writ of *mandamus* to compel the carrier to obey the law, and furnish to all shippers equal facilities. The damage and injury done by carriers under the system of secret rebates was the primary cause which induced Congress to pass the Interstate Commerce Act. But the carrier resorted to other means to favor certain shippers at the expense of their rivals, and to enable such shippers thereby to secure a monopoly in certain kinds of traffic. Among the means employed by the carrier was to permit certain shippers to build sidings and switches on the carrier's land which permission it denied to others. The advantage thus secured is obvious. The cost of loading, to a shipper using switches and sidings was greatly reduced, and gave the favored shipper a decided advantage over a competitor who enjoyed none of these facilities. Another method of discrimination was in the allotment of cars. The favored shipper got all the cars he wished. The competitor was occasionally furnished with cars, and was forbidden to furnish his own cars. The cars of the favored shipper were moved promptly on schedule time. The cars of the competitor were moved at the convenience of the carrier. The reported cases reveal this state of affairs principally in the shipping of coal and coke.

The cause of this unjust discrimination was further revealed in the recent case of *Interstate Com. Co. v. Baird*, 194 U. S. 25, in which it was shown that the favored shippers were also officers or directors of the transportation companies. It thus appeared that the carriers in discriminating in favor of certain shippers were discriminating in favor of themselves. The new section was intended to furnish a remedy, as far as practicable, for the sort of discrimination indicated.

The language of the new section requires the carrier not only to furnish cars, but "to move and transport traffic" and furnish cars "or other facilities for transportation." It has been held that this language furnishes a remedy for the discrimination practiced by one carrier against another operating a parallel or competing connecting line, which discrimination is forbidden



in section 3, last paragraph, and in section 7. The provisions of these sections have frequently been successfully evaded.

**Mandamus Remedy for Discrimination against Connecting Carrier.**— Assuming that a carrier cannot be compelled to make a contract for through rates or joint tariffs on through bills of lading with connecting lines, nevertheless the court has power, by writ of *mandamus*, to compel a carrier (the Wrightsville railroad) to receive and forward freights tendered at its terminus by another carrier (the petitioner, the Augusta Southern), and to prohibit it from charging for such service rates so unreasonable as to prohibit the shipment of interstate freights. A through bill of lading is a facility, but not a necessity, for interchange of rates. *Augusta Railroad v. Wrightsville Railroad*, 74 Fed. Rep. 522 (April, 1896, Cir. Ct. So. Dist. Ga.).

Petitioner, the Augusta Southern, claimed that the Wrightsville road discriminated against it in favor of a competing connecting carrier, the Central of Georgia, by charging the petitioner higher rates on through freights than it charged to the Central, its competitor. It alleged that prior to December 24, 1895, the respondent treated both roads alike on through freight, but on that day annulled its contract with petitioner, and charged it higher rates than its competitor for the purpose of injuring the petitioner and diverting its traffic. The court treated the petition as an application for a writ of *mandamus* under section 10 of the Act of March 2, 1889, being the new section 23, added to the act, and held that the local rate charged petitioner, \$2.76 per ton, was unreasonable compared with \$2.40 per ton charged its competitor for like service, and directed the respondent to forward and deliver shipments from the petitioner when it tendered or paid the rate charged its competitor for a like service, and directed it to afford petitioner equal and fair facilities for the interchange of interstate business. *Ib.*

**Mandamus — Peremptory Writ — Question of Fact.**— The general rule is that a peremptory writ of *mandamus* will not issue if, upon the pleadings, a question of fact remains to be disposed of. This rule has been modified by the act of March 2, 1889.

The statute confers upon the court discretionary power to issue

a peremptory writ "notwithstanding such question of fact is undetermined upon such terms as to security, payment of money into court, or otherwise as the court may think proper." This provision of the statute becomes operative only when the pleadings disclose a case where the shipper has been unjustly discriminated against by the carrier. Where the facts show that the carrier has refused to move traffic for a shipper at the same rates as are charged, or upon terms or conditions as favorable as are given by the carrier for like traffic under similar conditions to any other shipper" then a *prima facie* case is made out, and a peremptory writ may issue, and the question as to proper compensation may be reserved. But until a *prima facie* case is made, the relator is not entitled to any relief. *United States ex rel. Morris v. Delaware Railroad*, 40 Fed. Rep. 101.

**Mandamus — Unjust Discrimination must be Shown.**— To entitle a shipper to a writ of *mandamus* to compel the carrier to move interstate traffic, the relator must show that the carrier has discriminated unjustly against the relator and has denied the request to move his traffic "at the same rates as are charged or upon terms or conditions as favorable as those given by said carrier for like traffic upon similar conditions to any other shipper." *United States ex rel. Morris v. Delaware Railroad*, 40 Fed. Rep. 101.

A petition was filed by one Morris, a shipper of live stock, which set forth that the carrier refused to transport the relator's cattle upon cars of a special construction belonging to the American Live-Stock Transportation Company, which cars relator claimed were superior to ordinary cattle cars by reason of improvements in their construction. Relator claimed that the carrier shipped cattle for others in cars belonging to the Lackawanna Live-Stock Express Company, and that the cars of the latter company had some, but not all, of the improvements of cars of the American company. The court issued an alternative writ. Respondent filed a return to the writ, setting forth a denial of the material averments of the petition, and alleged a contract between respondent and the Lackawanna Live-Stock Company under which the latter agreed to furnish the carrier at least 200 of its improved cars for a period of five years to be run

on respondent's railroad. That the cars so furnished were so constructed as to permit respondent to carry coal in them when not loaded with live stock. That the carriage of coal was the principal business of relator. That under its contract, by reason of the special advantages in the construction of the cars so furnished, the relator agreed to pay mileage for the use of such cars in the same manner as if the cars were furnished by a connecting company. That after making such agreement, several carriers operating trunk lines agreed to discontinue hauling private stock cars, except for horses, for reasons set forth in the return. The return further alleged that the 200 cars so furnished to the relator were not used exclusively by any one shipper, but were available to all shippers.

The relator demurred to the return as not sufficient in law to justify the carrier in refusing to transport the relator's cattle in cars furnished by the American company. *Ib.*

The court, his honor, Judge WALLACE, sustained the demurrer and denied the writ upon the ground that it appeared by the petition and return that the relator was not discriminated against as matter of law because the carrier had never refused to carry his cattle in the cars furnished by the Lackawanna company, and that those cars, or a *pro rata* share thereof, were always available to the relator for his use. That the facts did not disclose any unjust discrimination toward the relator as to rates because respondent does not refuse to carry traffic for it under substantially similar circumstances and conditions to those of its service for the Lackawanna company, and the carrier gives the latter no unreasonable preference or advantage over the relators. *Ib.*

The court further held that it was unnecessary to decide upon the demurrer whether, as between the two live-stock companies, each ready and willing to furnish cattle cars to the carrier, the carrier would be guilty of unjust discrimination against the American company, if it refused to make a contract to use its cars upon the same terms and conditions as it contracted to use the cars furnished by its rival, the Lackawanna Live-Stock Company. *Ib.*

The Interstate Commerce Act changes the common-law rule, and places all shippers on an equality. At common law a carrier



was not obliged to place all shippers and patrons upon an absolute equality. It might charge less than fair compensation to one class of persons, but others could complain only in case the carrier charged the party complaining unreasonable rates. *Menacho v. Ward*, 27 Fed. 530; *Express Cases*, 117 U. S. 1. But the common-law rule in this regard has been modified by the Interstate Commerce Act which requires the carrier to treat all shippers impartially. *Ib.*

**Mandamus — Pro-rating Coal Cars.**— The gist of a proceeding under the statute (act of March 2, 1889) to compel by *mandamus* a carrier to furnish cars or facilities to move interstate traffic is an unjust discrimination in favor of one shipper over another similarly situated. Congress intended to remedy such a wrong by authorizing the Circuit or District Court of the United States to issue a writ of *mandamus*. There must not only be a discrimination, but there must be an unjust discrimination. *United States v. Norfolk Railway*, 109 Fed. Rep. 831.

In the case cited the court quoted from an opinion of Judge COOLEY (*Rice v. Railroad Co.*, 1 Int. Com. Rep. 503), as expressing the rule of law in this class of cases as follows:

“It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Railroad Co. v. Pratt*, 22 Wall. 123), and then to offer their use to everybody impartially. If the varieties of traffic are such, and their requirements of rolling stock so numerous and diversified that this becomes impracticable or burdensome so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot, with any justice, be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic.”

The relator, a shipper of coal from the Indian Ridge mine, complained that he was discriminated against by the railroad in not furnishing the relator sufficient cars to enable it to fill its orders, and that defendant favored Castner, Curran & Bullitt, com-

petitors, in its allotment of cars to them. An alternative writ was issued and evidence was taken. The carrier showed that it had not cars enough to accommodate all shippers, but distributed what it had among all shippers pursuant to a custom in vogue for many years in the Pocahontas coal field. The owners required operators who leased the mines to construct 100 coke ovens to every 500 acres of coal lands leased. Under this agreement the carrier was, by custom, bound to furnish one and one-half cars to each coke oven, and, in fact, furnished nearly two cars for each coke oven, and this was done among all shippers except upon arbitraries explained in the testimony as *pro rating* between localities on the east and west of Great Flat Top mountain. The court, upon the evidence, held that the relator failed to show unjust discrimination, and denied the writ. *United States v. Norfolk Railroad*, 109 Fed. Rep. 831.

Further held that the custom had been open and notorious for years, and under it no secret discrimination could be practiced. *Ib.*

*Held* further, that the offer of relator to furnish the carrier with cars to be used exclusively by the relator, the railroad to acquire the ownership of the cars by paying for them on instalments, did not alter the carrier's obligations to the public. Because if the carrier owned the cars or sought to acquire them, their use in favor of one shipper would operate as a discrimination against other shippers. If the carrier owned the cars it was bound to allow all shippers to participate in their use. *Ib.*

**Mandamus — Amendment of Writ.**— An alternative writ of *mandamus* may be amended after issue joined, and a peremptory writ may be issued to conform to the proof and findings. The petition for the writ prayed that relator, the Kingwood Coal Company, be decreed to be entitled to 33 $\frac{1}{3}$  per cent. of the total car supply furnished by the carrier to coal mines along its line. *Held*, that the allegation and prayer of the petition might be amended so as to conform to the facts, after which a peremptory writ could issue requiring the defendant carrier to cease giving a preference to two competing shippers and to furnish the relator, without discrimination and upon conditions as favorable as those given to other shippers, the full supply of cars due to it under

existing conditions amounting in tonnage thereof to at least 31 per cent. of present distribution. *United States ex rel. Kingwood Coal Co. v. West Virginia Railroad*, 125 Fed. Rep. 252.

Railroads have power by improper distribution of cars among competitors to build up the business of some shippers at the expense of others. It can ruin and drive out of business those shippers against whom it may choose to discriminate. To prevent such injustice, the Interstate Commerce Act was passed. The object and purpose of the act was to compel the carrier to treat all shippers alike, and to place every shipper upon an equality. The remedy afforded by the statute permits the shipper to invoke the summary remedy afforded by a writ of *mandamus* to compel the carrier to move traffic and furnish cars and proper facilities. *Ib.*

**Mandamus — Basis of Car Allotments.**— The relator was a miner and shipper of coal in Preston county, W. Va., on the line of the respondent's railroad, the Virginia and Northwestern. It joined as respondents two competitors, to-wit, the Irona Coal and Coke Co. and the Atlantic Coal and Coke Co., miners and shippers on the same road; the three collieries being the only ones operated along the line of relator's railway. Relator claimed that the carrier discriminated against it in favor of its rivals, the Irona and Atlantic companies. The cars were furnished to respondent carrier by the Baltimore and Ohio railroad, over whose line the coal ultimately reached the market. The inequality alleged was that the carrier furnished and distributed its cars as follows: To the relator, 17 per cent.; to the Irona Co., 27 per cent.; to the Atlantic Co., 56 per cent. The allotment was based on the following ratings, capacity, or *per diem* output of the respective mines: 400 tons to the relator, 600 tons to the Atlantic, and 1,250 tons to the Irona. *Held*, that in reaching a proper basis for the distribution an impartial and intelligent study of the capacity of the mines is necessary. This should be done by competent and disinterested experts charged with the duty to carefully examine the different elements that are essential factors in finding the daily output of the respective mines which are to share in the allotment, to-wit: (1) the working places; (2) number of mine cars, and their capacity;



(3) switch and tipple efficiency; (4) number and character of mining machines; (5) hauling system and power used; (6) number of employees; (7) the number of mine openings, and (8) miners' houses. None of these elements are absolutely controlling, the most important being the real working places and available points at which coal can profitably be mined. *United States ex rel. Kingwood Coal Co. v. West Virginia Railroad*, 125 Fed. Rep. 252.

**Right of Shipper to Designate Route.**—A shipper has a right to designate over what route he will ship his products, where there are a number of competing connecting lines, beyond the initial point or point of origin of the shipment. An attempt by the carrier to deny this right to the shipper may be enforced by injunction. Perhaps *mandamus* would also afford a summary remedy.

The question as to the shipper's right to designate the route of shipment arose in California at the suit of shippers of oranges, lemons, and other citrous fruits engaged in shipping from points in California to points east of the Missouri river. The defendant carriers, the Southern Pacific, and the Atchison, Topeka and Santa Fe companies, promulgated a rule whereby shippers of fruit from California to eastern cities were forbidden the right to designate over what route their property should be transported, when such shipments were made over defendant's lines at the initial point. Under this rule the carriers assumed the right to arbitrarily bill the merchandise over the joint or continuous lines or routes established by the initial carriers, between points of shipment and through points of destination. The shipper was obliged under the carrier's rule to contract for a through rate at the published rate or charge applying over such continuous route or line. Defendants also refused to keep open to the public their published tariff rates on oranges, lemons, and citrous fruits between points of shipment and destination, when such rates were lawfully in force over each route or line published in their joint schedule of tariff.

These facts were shown to the Interstate Commerce Commission and after full hearing the Commission made an order di-

recting the carriers to cease and desist from maintaining or enforcing the rule complained of whereby the shipper was denied access to the published tariff rates over all connecting lines, and was denied the right to designate the route of shipment beyond the point of origin. The carriers refused to obey the order. The Commission then brought suit to enforce the order in the United States Circuit Court, southern district of California, and in its petition prayed for an injunction perpetual to restrain defendants from doing the acts complained of. The carriers demurred to the petition. The court overruled the demurrers and directed defendants to answer.

The court held that a rule reserving to the defendants, as initial carriers, the unqualified right of routing beyond its own terminal all shipments made under an established joint through rate could be tested in a suit in which the connecting carriers who joined in making the rate were not parties. Such connecting carriers while proper parties to the suit were not essentially necessary parties. *Interstate Com. Co. v. Southern Pacific*, 123 Fed. Rep. 597. (June, 1903, Circ. Ct. So. Dist. Cal.)

*Held* further, that a finding by the Commission that the purpose and effect of the rule complained of by which defendants as initial carriers reserved the right to route through shipments beyond their own lines was to assist in carrying into effect a pooling agreement between their connecting carriers in violation of section 5 of the Commerce Act is pertinent to the inquiry, and supports the legality of the order of the Commission. *Ib.*

*Held* further, that the question as to whether the rule complained of subjected shippers to undue, unjust, and unreasonable prejudice and disadvantage, and gave to the initial carriers an undue and unreasonable preference, was a question of fact, and an order based on findings to support it was *prima facie* a lawful order, and one which the court is required to enforce under section 16 of the act. *Ib.*

## CHAPTER III.

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### THE SHERMAN ACT.

Entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." Approved July 2, 1890. Also Anti-Trust Provisions of Wilson Bill, in Effect August 27, 1894.

### ANALYSIS OF STATUTES.

#### THE SHERMAN ACT.

- SEC. 1. Trusts and monopolies unlawful — Misdemeanor to contract.
2. Misdemeanor to combine.
  3. Contract in restraint of trade illegal — Penalty.
  4. Remedy injunction — Jurisdiction of Federal court.
  5. Additional parties may be brought in.
  6. Trust property, when confiscated.
  7. Suits by injured parties — Treble damages.
  8. Persons defined; to include corporations.
  73. Wilson Bill — Trusts and monopolies by importers.
  74. Wilson Bill — Remedy injunction — Jurisdiction of Federal courts.
  75. Wilson Bill — Additional parties may be brought in.
  76. Wilson Bill — Trust property, when confiscated.
  77. Wilson Bill — Suit by injured parties — Treble damages.
  34. Dingley Bill does not repeal anti-trust features of Wilson Bill, contained in the foregoing sections.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

§ 1. **Trusts and Monopolies Unlawful.**— Every contract, combination in the form of trust or otherwise, or



conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. [**Misdemeanor to Contract.**] Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**The Sherman Act.**—The act of July 2, 1890, is practically a supplement to the provisions of the Interstate Commerce Act. The latter applies only to common carriers. Its primary object was to place all shippers upon an equality and to declare illegal all discrimination among shippers, and to make it a crime for any common carrier to give a rebate, or unjust preference, or advantage to one shipper, whereby he would be able to undersell his competitors, destroy competition, and monopolize a particular branch of trade or commerce. It was intended also to prohibit parallel or competing lines of railroad from forming a pool, association, or trust to destroy competition and place the community at the mercy of carriers controlled as a unit. In other words pooling was forbidden because the result of such a combination, it was claimed, would place the shipper and consumer under the control of the carrier.

The result of the rebate system practiced by the carriers of the country in direct violation of the Commerce Act enabled certain shippers to destroy competition in certain branches of trade. The evidence in some cases showed that these favored shippers were officers of the carrying companies who gave the rebates that enabled the beneficiary of the carrier's bounty to destroy competition. In so doing the carrier was practically shipper as well as carrier. In giving rebates to favored shippers the carriers were in effect giving the rebates to themselves. Equality of opportunity was denied. The merchant or manufacturer who was not favored could not build his own railroad and was obliged

either to be absorbed by the trust, at whatever price the trust saw fit to allow, or to go out of business.

Under these conditions powerful industrial combinations were formed to control the production and sale of commodities, including the necessities of life. These combinations are popularly termed trusts. In brief a trust combines the control or power to control several rival competing businesses to the end that competition among them may be suppressed. The market is made daily by a committee of the trust, appointed for that purpose and the price to the consumer is no longer regulated by fair and legitimate competition which exists only when trade and commerce is allowed to operate free, unobstructed, and unrestrained. The market price is made by the committee of the trust. The consumer must pay, and has no redress, and no remedy.

This condition of affairs became onerous and oppressive. Redress was sought by legislation, making such combinations illegal, and those engaged in them guilty of crime. The Sherman Act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies" was the result. The act is universal in its application and embraces *all* contracts and *every* contract in restraint of trade, whether made by carriers, manufacturers, producers, or shippers. A railroad corporation, while governed by the provisions of the Interstate Commerce Act, is also governed by the provisions of the Sherman Act. Both acts must stand, the Supreme Court has declared. They are not hostile and conflicting. The object of both is to reach the same evil, and both statutes must be so construed.

**Constitutionality of the Sherman Act.**—The validity and constitutionality of the Sherman Act has never been seriously questioned. The point was raised in the *Joint Traffic Association* case, 171 U. S. 505, but the Supreme Court held the act valid. The court declared that the act was clearly within the power conferred by the Constitution upon Congress to "regulate commerce." The laws enacted in the legitimate exercise of this power are supreme. "Anything in the Constitution or laws of any State to the contrary notwithstanding." "An act of Congress," says Mr. Justice HARLAN in the *Merger* case, *infra*

(March, 1904), a case arising under the Sherman Act, "constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a State court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohen v. Virginia*, 6 Wheat. 264. These views have been often expressed by this court."

**Summary of Authority under Sherman Act.**—Prior to the 14th day of March, 1904, the Supreme Court of the United States had decided a number of cases (seven in all) directly under the Sherman Act, construing the scope of the act and the meaning of its provisions. The *Merger* case (*Northern Securities Co. v. United States*, 193 U. S. 197), decided March 14, 1904, was perhaps the most important deliverance of the court, since the famous decision of Chief Justice MARSHALL, in *Gibbons v. Ogden* (9 Wheat. 197). Mr. Justice HARLAN took occasion to summarize all previous decisions under the statute, and state what he conceived to be the rules of law established by them. This summary is as follows:

"The first case in this court arising under the Anti-Trust Act was *United States v. E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290. That was followed by *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *Addyston Pipe Co. v. United States*, 175 U. S. 211, and *Montague v. Lowry*, 193 U. S. 35. To these may be added *Pearsall v. Great Northern Railroad*, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States v. Knight*, it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced in-



terstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in *United States v. Trans-Missouri Freight Assn.*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules, and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States v. Joint Traffic Assn.*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in *Hopkins v. United States* and *Anderson v. United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Ad-dystone Pipe Co. v. United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided; and in *Montague v. Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates, and mantels, in different States, whereby they controlled, or sought to control, the price of such articles in those States, was condemned by the act of Congress. In *Pearsall v. Great Northern R. Co.*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: 'The consolidation of these two great corporations will unavoidably result in giving to the defendant (the Great Northern) a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public — that their best security is in competition.'

#### **Legal Propositions Deducible from Former Decisions.—**

Mr. Justice HARLAN in his opinion in the *Merger* case, after having briefly summarized the prior cases decided in the court

as above, proceeds to state the legal propositions deducible from them as follows:

“It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

“That although the act of Congress, known as the Anti-Trust Act, has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in *restraint* of trade or commerce *among the several States or with foreign nations*;

“That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

“That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

“That combinations, even among private manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;

“That Congress has the power to establish *rules* by which *interstate and international commerce* shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

“That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain such trade or commerce, is made illegal by the act;

“That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

“That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international

trade or commerce or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition;

"That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

"That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

"No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties."

**The Sugar Trust Case.**—The first case under the Sherman Act, *United States v. Knight Co.*, 156 U. S. 1, known as the Sugar Trust case, reached the Supreme Court in the fall of 1894. It was argued October 24, 1894, and was decided January 21, 1895.

On behalf of the United States as complainant, a bill was filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, against the E. C. Knight Company, the American Sugar Refining Company, the Spreckels Sugar Refinery, the Franklin Sugar Company and the Delaware Sugar House, praying for an injunction to restrain defendants from continuing alleged violations of the Sherman Act, and for the cancellation of the agreements and re-delivery of the stock and for other relief. The bill alleged in substance that the four defendants, the Knight Company (a Pennsylvania corporation), the Franklin Sugar Company (a Pennsylvania corporation), the Spreckels Company (a Pennsylvania corporation), and the Delaware Sugar House (a Pennsylvania corporation), until about March 4, 1892, were independently engaged in the manufacture and sale of sugar and sold their products in the several States of the United States, and were all engaged in trade or commerce with the several States and with foreign nations, and manufactured about



33 per cent. of the sugar refined in the United States, and were competitors of defendant, the American Sugar Refining Company. That prior to March 4, 1894, the four defendants above named and defendant, the American Sugar Refining Company, controlled all the sugar refineries in the United States, except that controlled by the Revere Company of Boston, which latter produced annually about 2 per cent. of the total amount of sugar refined in the United States. That prior to March 4, 1892, 98 per cent. of all the sugar produced in the United States was manufactured by the five defendants above named.

The bill then alleged that the defendant, the American Sugar Refining Company, in order to obtain control of the production of sugar in the United States, and to control the price of that commodity, acting through John E. Searles, Jr., entered into an unlawful and fraudulent scheme to purchase the stock, machinery, and real estate of the other four defendant companies, and that they had entered into contracts with said companies for the purchase of all the stock of the four companies, in exchange for shares of the defendant the American Sugar Refining Company, in order to restrain trade and commerce in refined sugar among the several States, and to increase the price at which refined sugar was sold, and that said agreements and contracts were illegal, and were in restraint of trade and commerce and were in violation of the provisions of the Sherman Act. Answers were filed and proof taken. The facts were proved substantially as alleged with regard to the purchase and sale of the stock, and the amount of sugar produced, but defendants claimed the combination was effected for economy, that the price had been slightly advanced, but was still lower than it had been for some years before.

The Circuit Court dismissed the bill on the ground that the proof did not show a contract or conspiracy to restrain or monopolize trade or commerce among the several States or with foreign nations (60 Fed. Rep. 306). This decree was affirmed in the United States Circuit Court of Appeals (March, 1894), 60 Fed. Rep. 934. On appeal to the Supreme Court of the United States the decree of the Circuit Court of Appeals was affirmed (January, 1895).

Chief Justice FULLER, in the course of his opinion, observes: "It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations, but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfer; yet the act of Congress only authorizes the Circuit Courts to proceed by way of preventive and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce." *United States v. Knight Co.*, 156 U. S. 1.

**Dissenting Opinion of Justice Harlan.**— The questions involved and discussed under the Federal statutes with respect to trade and commerce present, primarily, questions of law. In a larger sense they involve questions of economics and political science. The questions affect directly the welfare and happiness of the community or the consumer because they relate to the price which must be paid by the consumer for necessities of life and staple articles of commerce. The dissenting opinion of Justice HARLAN in the *Knight* case was based on the assumption that the case involved more than the purchase of the

stock of a manufacturing corporation. That it involved also the sale and transportation to other States of specific articles of commerce. In the *Addystone Pipe* case (175 U. S. 211), decided in December, 1899, every member of the court concurring, indorsed the reasoning of Justice HARLAN in his dissenting opinion in the *Sugar Trust* case, because in the *Addystone Pipe* case, there was proof that the combine was engaged in disposing of their manufactured goods in diverse States; and that such proof, the majority of the court held, was lacking in the *Knight* case. Mr. Justice PECKHAM, writing the decision in the *Addystone Pipe* case, which was unanimous, observes in this connection:

“The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State was held to be immaterial, and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the States as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of congress because such a contract, or combination, did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce.” (Opinion of PECKHAM, J., 175 U. S. at page 240.)

In support of his views in the *Knight* case, *supra*, Justice HARLAN said in part:

“Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey, for the purpose of buying, manufacturing, refining, and selling sugar in different parts of the country, had



obtained the control of *all* the sugar refineries in the United States except five, of which four were owned and operated by Pennsylvania corporations — the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company, and the Delaware Sugar House — and the other, by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about 33 per cent., and that of the Boston company about 2 per cent., of the entire quantity of sugar refined in the United States.

"In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation — using for that purpose its own stock — purchased the stock of those companies, and thus obtained absolute control of the entire business of sugar refining in the United States except that done by the Boston company, which is too small an amount to be regarded in this discussion.

"The object," the court below said, "in purchasing the Philadelphia refineries was to obtain a greater influence or *more perfect control over the business* of refining and selling sugar in this country." This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not, therefore, analyze the evidence upon this point. In its consideration of the important constitutional question presented, this court assumes on the record before us that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the National Government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.

\* \* \* \* \*

"It would seem to be indisputable that no *combination* of corporations or individuals can, *of right*, impose unlawful restraints upon *interstate* trade, whether upon transportation or upon such interstate intercourse and traffic as precede transportation, any more than it can, *of right*, impose unreasonable restraints upon the completely internal traffic of a State. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a *combination* of corpora-

tions or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish one primary object of the Union, which was to place commerce *among the States* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.

\* \* \* \* \*

“In my judgment, the citizens of the several States composing the Union are entitled, of right, to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which by the law everywhere is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot co-exist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States, in all **recognized** articles of commerce, absolutely free from unreasonable or illegal restrictions imposed by combinations, is justified by an express grant of power to Congress and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

“Undue restrictions or burdens upon the purchasing of goods, in market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *State* within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar *to be transported to other States*, how comes it that combinations of corporations or individuals, within the same State, may not be prevented by the National Government from putting unlawful restraints upon the purchasing of that article *to be carried from the State in which such purchases are made*? If the national power is competent to repress *State* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent



unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may — so far as national power and interstate commerce are concerned — do, with impunity, what no State can do.

\* \* \* \* \*

“In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forebore to impose any limitations upon the exercise of that power to except those arising from the general nature of the government, or such as are embodied in the fundamental guarantees of liberty and property. It gives to Congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of Congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief Justice MARSHALL three-quarters of a century ago, and which has been repeatedly affirmed by this court.

\* \* \* \* \*

“While the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be unconstitutional if interpreted as embracing such unlawful restraints upon the purchasing of goods in one State to be carried to another State as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the States. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country, in the buying and selling of articles — especially the necessities of life — that go into commerce among the States. The doctrine of the autonomy of the States cannot properly be invoked to justify a denial of power in the national government to meet such an emergency, involving as it does that freedom



of commercial intercourse among the States which the Constitution sought to attain.

“It is said that there are no proofs in the record which indicate an *intention* upon the part of the American Sugar Refining Company and its associates to put a restraint upon trade or commerce. Was it necessary that formal proof be made that the persons engaged in this combination admitted, in words, that they intended to restrain trade or commerce? Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain interstate trade or commerce? Men who form and control these combinations are too cautious and wary to make such admissions orally or in writing. Why, it is conceded that the object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object is disclosed upon the very face of the transactions described in the bill. And it is provided — indeed, is conceded — that that object has been accomplished to the extent that the American Sugar Refining Company now controls 98 per cent. of all the sugar refining business in the country, and, therefore, controls the price of that article everywhere. Now, the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law — there being no adjudged case to the contrary in this country — a direct restraint of trade in the articles for the control of sales of which in this country that combination was organized. And that restraint is felt in all the States, for the reason known to all, that the article in question goes, was intended to go, and must always go, into commerce among the several States, and into the homes of people in every condition of life.

“A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without buyers being burdened by unlawful restraints imposed by combinations or corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that recognizes

none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness — so powerful that no single State is able to overthrow them and give the required protection to the whole country, and so all pervading that they threaten the integrity of our institutions.

“We have before us the case of a combination which absolutely controls, or may, at its discretion, control the price of all refined sugar in this country. Suppose another combination, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals, and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power — one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?

“To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. ‘Powerful and ingenious minds,’ this court has said, ‘taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the State are retained if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived.’ *Gibbons v. Ogden*, 9 Wheat. 1, 222.

“While a decree annulling the contracts under which the combination in question was formed may not, in view of the facts disclosed, be effectual to accomplish the object of the act



of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the States, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which Congress intended to accomplish, namely, to protect the freedom of commercial intercourse among the States against combinations and conspiracies which impose unlawful restraints upon such intercourse.

“For the reasons stated I dissent from the opinion and judgment of the court.”

**Railroad Trust Cases.**— The next case decided in the Supreme Court involving the Sherman Act was *United States v. Trans-Missouri Freight Assoc.* (argued December, 1896; decided, March 22, 1897). The controversy arose upon a bill filed January 6, 1892, on behalf of the United States in the Circuit Court of the United States for the district of Kansas, first division, to dissolve a voluntary association described in the bill as the “Trans-Missouri Freight Association” against that association, the Atchison, Topeka & Santa Fe railroad and seventeen other railroad companies, praying for the dissolution of the association or combination on the ground that it was a combination in restraint of trade and commerce, in violation of the Sherman Act, and for an injunction to restrain defendant companies from carrying into effect the agreement under which the association was formed. The bill set forth the compact or agreement entered into by defendant carriers and the articles of the association, which it was averred was entered into to pool the issues of the carriers and punish all infractions of the agreement by any defendant company, to destroy competition among the competing carriers, and increase freight rates, and to monopolize the freight traffic between the States and Territories of the United States. The answers practically admitted the facts alleged in the bill, but denied that there was any intent to monopolize traffic, or raise freight rates, or restrain commerce. Defendants alleged their purpose was to maintain only just and reasonable rates, and that the agreement had been duly filed pursuant to section 6 of the Commerce Act. The Circuit Court



dismissed the bill November, 1892 (53 Fed. Rep. 440), on the ground that the agreement was not in restraint of trade, and that carriers were not embraced within the provisions of the Sherman Act. In October, 1893, the Circuit Court of Appeals affirmed the decree, and an appeal was taken to the Supreme Court of the United States, which reversed the lower courts (Justices WHITE, FIELD, GRAY, and SHIRAS dissenting) March 22, 1897, on the ground that railroad companies, carrying and transportation corporations were within the provisions of the Sherman Act, and agreements made by them, if in restraint of trade and commerce were illegal and void. Mr. Justice PECKHAM, Chief Justice FULLER, and Justices HARLAN, BREWER, and BROWN concurring, held that the agreement set forth in the bill was illegal and void, and that the Circuit Court should have sustained the bill and granted the relief prayed for.

After an elaborate discussion of the law Mr. Justice PECKHAM observed: "In the view we have taken of the question, the intent alleged by the government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. \* \* \* The agreement while in force and assuming to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade and commerce as described in the act.

"For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce no matter what the intent was upon the part of those who signed it."

The court further held that the United States could maintain the suit, by virtue of the fourth section of the Sherman Act, and the fact that it has no pecuniary interest in the result, or in the question to be decided was not material, and that Congress had power to create a remedy by injunction as more efficient than any other civil remedy. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

For a further report of this case see under section 5 of the Interstate Commerce Act, page 122, *ante*.

**Railroad Trust Cases, Continued.**— The carrying companies attempted, indirectly, to secure a reversal of the *Trans-Missouri* case. While it was still pending thirty-one railroads entered into an association, governed by a constitution and by-laws, known as the Joint Traffic Association, agreement to take effect January 1, 1896, and to continue in force for five years. The provisions of this agreement were substantially similar to that involved in the *Trans-Missouri* case. The joint-traffic agreement, however, contained an express clause that the powers conferred upon the managers of the association should be so construed and exercised *so as not to permit any violation of the Interstate Commerce Act*. Yet the agreement gave the association jurisdiction and control of the transportation business and competitive traffic between Chicago and the Atlantic coast, with power to fix rates, fares, and charges and change the same from time to time. All parties violating the rules of the association were to be disciplined, fined, and punished. *United States v. Joint Traffic Assn.* (October, 1898), 171 U. S. 505.

A bill was filed on behalf of the United States to dissolve the association and enjoin the members from carrying out the agreement. The pleadings were similar to those in the *Trans-Missouri* case. The bill was dismissed in the Circuit Court, and on appeal the decree was affirmed in the Circuit Court of Appeals. On appeal to the Supreme Court of the United States, October 24, 1898, the decrees of the lower courts were reversed. The court, Mr. Justice PECKHAM, with whom Chief Justice FULLER and Justices HARLAN, BREWER, and BROWN concurred, *held* that the case could not be distinguished from the *Trans-Missouri* case. Counsel in the *Joint Traffic Association* case urged for the first time that the Sherman Act was unconstitutional, and impinged upon the rights of property which it was claimed were vested in the carrying corporations. On this point Mr. Justice PECKHAM observed:

“The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires

them to perform the service upon equal terms to all. This public service, that of transportation of passengers and freight, is a part of trade and commerce, and when transported between States such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several States.

"Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them, by means of which competition is to be smothered." *United States v. Joint Traffic Assn.* (October, 1898), 171 U. S. 505.

For further reference to above case see under section 5 of the Interstate Commerce Act, *ante*, page 122.

**Cattle Trust Cases.**—The next case which reached the Supreme Court of the United States, in order of time, was that of *Hopkins v. The United States*, which was brought in behalf of the government in the Circuit Court of the United States, district of Kansas, first division, to enjoin the cattle trust, an unincorporated association, a constituent of the beef trust, known as the Kansas City Live Stock Exchange, and its members, defendant Henry Hopkins and others, upon the ground that defendants were engaged in an illegal combination to restrain trade and commerce in the business of buying and selling, receiving, and handling as commission merchants live stock received in the stockyards at Kansas City, Kan., and Kansas City, Mo., and sold for shipment to various States and Territories. The bill set forth the rules and regulations of association, with appropriate allegations, bringing defendants within the provisions of the Sherman Act. Upon the answers of defendants the Circuit Court sustained the bill and granted the injunction as prayed for (82 Fed. Rep. 529). On appeal certain questions were certified by the Circuit Court of Appeals to the Supreme Court of the United States, and the latter directed that the entire record be brought before it on a writ of *certiorari*. The Supreme Court reversed the Circuit Court and remitted the case with directions to dismiss the bill with costs. *Hopkins v. The United States* (October, 1898), 171 U. S. 578.



The Supreme Court based its decision in the above case, and also in the case of *Anderson v. The United States* (171 U. S. 604), upon the ground that the business of receiving consignments of live stock from owners in various States, feeding them and disposing of them in the market, and paying the proceeds to the owners after deducting charges, expenses, and advances, was not interstate commerce within the meaning of the Sherman Act.

The Kansas City Live Stock Exchange operated and maintained stockyards both at Kansas City, Kan., and Kansas City, Mo., and furnished facilities for keeping and feeding live stock sent to its members from various States and disposing of the stock in the open market. The association adopted a constitution and by-laws containing certain conditions, restrictions, and limitations as to the mode of conducting its business. Among these was a rule that no member of the association should purchase live stock from any commission merchant in Kansas City not a member of the association; also fixing a minimum rate of commissions on sales of live stock; forbidding the employment of agents to solicit consignments, except such as should be employed at a stipulated salary; prohibiting the sending of prepaid messages by telegraph or telephone, giving information as to the condition of the market, but permitting quotation of actual sales on the date made. *Ib.*

The court held that the Sherman Act embraced only contracts and agreements affecting interstate commerce, and that the agreements complained of did not immediately and directly affect such commerce within the provisions of the Act. That while the indirect effect of the agreements might enhance the cost of marketing cattle, yet the agreements themselves would not necessarily, for that reason, be in restraint of interstate trade or commerce. Their effect is either indirect, or relate to charges for the use of facilities furnished. Such agreements would be valid provided the charges agreed upon were reasonable, even though such charges might enhance the cost of doing business. Citing *Packet Co. v. St. Louis*, 100 U. S. 423; *Packet Co. v. Cattlesburg*, 105 U. S. 559; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Huse v. Glover*, 119 U. S. 543; *Ouachita*

*Packet Co. v. Aiken*, 121 U. S. 444; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92. *Ib.*

The court held further that the agreements did not affect the right of cattle-owners to sell and dispose of their stock, and the remedy for exorbitant charges was one of local law. The fact that the yards of the association were partly in Kansas and partly in Missouri did not make the business of the association upon the facts in the case interstate commerce. *Ib.*

The ruling in the *Hopkins* case was also applied in a similar suit by the United States against members of the Traders' Live Stock Exchange, an unincorporated association similar in character to the Kansas Live Stock Exchange, doing business principally in Kansas City, Mo. *Anderson v. United States*, 171 U. S. 604.

**Iron Pipe Trust.**—The case entitled *Addystone Pipe Co. v. United States*, 175 U. S. 211, was begun in January, 1897, and decided in the Supreme Court December 4, 1899. The suit was begun by the United States District Attorney in the eastern district of Tennessee at the instance of the Attorney-General in behalf of the United States against six corporations engaged in the manufacture of cast-iron pipe, said to be subsidiary corporations of the Standard Oil Trust, charging defendants with having combined and conspired to unlawfully restrain interstate commerce in the sale of such pipe in violation of the provisions of the Sherman Act. The petition prayed that all pipe sold and transported from one State to another, under the combination and conspiracy described, be seized and confiscated as provided by law, and for a decree dissolving the unlawful conspiracy, and for an injunction perpetual, to restrain defendants from operating under the combination.

The petition alleged that defendants were practically the only manufacturers of cast-iron pipe within a territory embracing thirty-six States and Territories, and that in order to create a monopoly of trade within the territory they entered into a contract or association known as the Associated Pipe Works, in order to destroy competition and force the public to pay unreasonable prices. That each defendant in the association selected its representative, and these representatives constituted the execu-

tive committee of the trust. It is the duty of this committee to fix the price to bid for pipe to be furnished for any public work for which bids were advertised. That it was agreed that members of the association should not compete with each other, and it was further agreed that a bonus should be charged on all work done and pipe furnished, and this bonus was added to the market price of pipe sold. The amount of the bonus was from \$3 to \$9 per ton. That on all bids for public work the committee decided to whom the bid should be awarded, to be determined by the highest bonus which any company, as between themselves, was willing to pay. The company assigned puts in its bid to the city or company advertising for pipe, and the committee arranges to "protect" the bid by directing that all other bids shall be slightly in advance of the protected bid.

The association parcels out its dominions by declaring all territory embraced in the thirty-six States and Territories which constituted its immediate field, being mainly western and southern States, as "pay territory." All outside of this is designated "free territory." Within the "pay territory" were designated certain "reserved cities" in which only particular members of the association shall have the work in consideration of fixed bonuses to be paid into the trust. The "pay cities" are parceled out under the rules of the association to the members.

**Bonuses in "Pay Territory" and "Reserved Cities."**—The minutes of the Associated Pipe Works, representing all constituent members of the combination, divided among them its "pay territory" and fixed its bonuses therein as follows:

	Bonus.		Bonus.
Alabama .....	\$3 00	Tennessee, east of Cleve-	
Birmingham, Ala. ....	2 00	land .....	\$2 00
Anniston, Ala. ....	2 00	Tennessee, middle and	
Mobile, Ala. ....	1 00	west .....	3 00
Arizona .....	3 00	Illinois, except Madison	
California .....	1 00	and East St. Louis..	2 00
Colorado .....	2 00	Wyoming .....	4 00
Indian Territory .....	3 00	Oregon .....	1 00
North Carolina .....	1 00	Ohio .....	1 50



	Bonus.		Bonus.
North Dakota .....	\$2 00	West Virginia .....	\$1 00
South Dakota .....	2 00	Kansas .....	2 00
Florida ..	1 00	Kentucky .....	2 00
Georgia ..	2 00	Louisiana .....	3 00
Atlanta, Ga.....	2 00	Mississippi .....	4 00
Georgia coast points...	1 00	Missouri .....	2 00
Idaho .....	2 00	Montana .....	3 00
Nevada .....	3 00	Nebraska .....	3 00
Oklahoma .....	3 00	New Mexico .....	3 00
Wisconsin .....	2 00	South Carolina .....	1 00
Texas interior .....	3 00	Minnesota .....	2 00
Texas coast .....	1 00	Utah .....	4 00
Washington Territory..	1 00	Indiana .....	2 00
Michigan .....	1 50	Iowa .....	2 00

All other territory free.

Defendants demurred jointly and severally to the bill in so far as it prayed for confiscation of goods *in transit* on the ground that the Sherman Act can afford no such relief in a suit in equity. Defendants also filed answers admitting existence of the association, but alleging its purpose was for economy and to avoid "ruinous competition." Denied the association was in restraint of trade, or was intended to create a monopoly. Testimony was in form of affidavits. On February 5, 1897, after hearing the court dismissed the bill. (78 Fed. Rep. 712.)

**Pay Territory — How Allotted — Bonuses — How Divided.—**

The evidence in the *Addystone Pipe* case showed how the pay territory was allotted or parceled out to the members of the association, and the mode in which the bonuses should be divided. The States and Territories embraced within the domain included Alabama, Arizona, California, Colorado, North Dakota, South Dakota, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Indian Territory, North Carolina, South Carolina, New Mexico, Minnesota, Michigan, Tennessee, Texas, Illinois, Wyoming, Indiana, Ohio, Utah, Washington, Oregon, Iowa, West Virginia, Nevada, Oklahoma, and Wisconsin.

The mode or plan whereby territory was allotted and profits divided was shown by the minutes of the association offered in evidence as follows:

**Division of bonuses.**— “First. The bonuses on the first 90,000 tons of pipe secured in any territory, 16" and smaller, shall be divided equally among six shops. Second. The bonuses on the next 75,000 tons, 30" and smaller sizes, to be divided among five shops, South Pittsburg not participating. Third. The bonuses on the next 40,000 tons, 36" and smaller sizes, to be divided among four shops, Anniston and South Pittsburg not participating. Fourth. The bonuses on the next 15,000 tons, consisting of all sizes of pipe, shall be divided among three shops, Chattanooga, South Pittsburg, and Anniston not participating.

**Bonuses from excess of shipments.**— The above division is based on the following tonnage of capacity: South Pittsburg, 15,000 tons; Anniston, 30,000 tons; Chattanooga, 40,000 tons; Bessemer, 45,000 tons; Louisville, 45,000 tons; Cincinnati, 45,000 tons. When the 220,000 tons have been made and shipped, and the bonuses divided as hereinafter provided, the auditor shall set aside into a reserve fund all bonuses arising from the excess of shipments over 220,000 tons, and shall divide the same at the end of the year among the respective companies according to the percentage of the excess of tonnage they may have shipped (of the sizes made by them) either in pay or free territory. It is also the intention of this proposition that the bonuses on all pipe larger than 36 inches in diameter shall be divided equally between the Addystone Pipe & Steel Company, Dennis Long & Co., and the Howard-Harrison Company.”

**Five votes control.**— On any question coming before the association requiring a vote, it shall take five affirmative votes thereon to carry said question, each member of this association being entitled to but one vote.

**Territory apportioned.**— Third. The Addystone Pipe & Steel Company shall handle the business of the gas and water companies of Cincinnati, Ohio, Covington and Newport, Ky., and pay the bonus hereafter mentioned, and the balance of the parties to this agreement shall bid on such work such reasonable prices as they shall dictate. Fourth. Dennis Long & Company, of Louisville, Ky., shall handle Louisville, Ky., Jeffersonville, Ind., and New Albany, Ind., furnishing all the pipe for gas and water-works in above-named cities. Fifth. The Anniston Pipe & Foundry Company shall handle Anniston, Ala., and Atlanta,

Ga., furnishing all pipe for gas and water companies in above-named cities. Sixth. The Chattanooga Foundry & Pipe Works shall handle Chattanooga, Tenn., and New Orleans, La., furnishing all gas and water pipe in the above-named cities. Seventh. The Howard-Harrison Iron Company shall handle Bessemer and Birmingham, Ala., and St. Louis, Mo., furnishing all pipe for gas and water companies in the above-named cities; extra bonus to be put on East St. Louis and Madison, Ill., so as to protect the prices named for St. Louis, Mo. Eighth. South Pittsburg Pipe Works shall handle Omaha, Neb., on all sizes required by that city during the year of 1895, conferring with the other companies and co-operating with them. Thereafter they shall handle the gas and water companies of Omaha, Neb., on such sizes as they make."

"NOTE.—It is understood that all the shops who are members of this association shall handle the business of the gas and water companies of the cities set apart for them, including all sizes of pipe made by them."

**Auditor, duties of.**—The by-laws provided for an auditor of the association, whose duty it was to keep account of the business done by each shop both in pay and free territory. On the first and sixteenth of each month, he was required to send to each shop "a statement of all shipments reported in the previous half month, with a balance sheet showing the total amount of the premiums on shipments, the division of the same, and debit, credit, balance of each company."

The system of bonuses, as a means of restricting competition and maintaining prices, was not successful. A change was therefore made by which prices were to be fixed for each contract by the association, and, except in reserved cities, the bidder was determined by competitive bidding of the members, the one agreeing to give the highest bonus for division among the others getting the contract. The plan was embodied in a resolution passed May 27, 1895, in the words following:

**Rule to advance prices.**—"Whereas, the system now in operation in this association of having a fixed bonus on the several States has not, in its operation, resulted in the *advancement in the prices of pipe*, as was anticipated, except in reserved cities, and some further action is imperatively necessary in order to accomplish the ends for which this association was formed: therefore, be it resolved, that from and after the first day of June, that all competition on the pipe lettings shall take place among the various pipe shops prior to the said letting. To accomplish



this purpose it is proposed that the six competitive shops have a representative board located at some central city, to whom all inquiries for pipe shall be referred, and said board *shall fix the price* at which said pipe shall be sold, and bids taken from the respective shops for the privilege of handling the order, and the party securing the order shall have the protection of all the other shops." In pursuance of the new plan, it was further agreed "That all parties to this association, having quotations out, shall notify their customers that the same will be withdrawn by June 1, 1895, if not previously accepted, and upon all business accepted on and after June 1st *bonuses shall be fixed by the committee.*"

"At the meeting of December 19, 1895, it was moved and carried that, upon all inquiries for prices from 'reserved cities' for pipe required during the year of 1896, *prices and bonuses* should be fixed at a regular or called meeting of the principals. At the meeting of December 20, 1895, the plan for division of bonuses originally adopted was modified by making the basis the total amounts shipped into 'pay' territory rather than the totals shipped into 'pay' and 'free' territory."

The United States Circuit Court of Appeals on February 8, 1898, reversed the Circuit Court, in an elaborate opinion by Mr. Justice TAFT, with instructions to enter a decree for the United States, perpetually enjoining defendants from maintaining the combination and from doing any business thereunder. On December 4, 1899, a unanimous opinion was rendered in the Supreme Court of the United States, Mr. Justice PECKHAM writing, sustaining the position of Judge TAFT in the Court of Appeals, except only as to goods sold by the corporation within the borders of its own State. *Addystone Pipe Co. v. United States*, 175 U. S. 211.

It was urged on behalf of the defendants that assuming that the contracts and agreements complained of did restrain interstate commerce, yet Congress had no power under the commerce clause to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object and result in a direct and substantial obstruction to, or regulation of, that commerce. The argument was founded on the assumption that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating State legislation, and that this power could not be exercised so as to interfere with private contracts.

Mr. Justice PECKHAM disposed of this contention in a masterly opinion, in the course of which he observes:

"The provision in the Constitution does not, as we believe, exclude Congress from legislating in regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally regulate to a greater or less degree commerce among the States. \* \* \*

"If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them. The private contracts may, in truth, be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character." *Addystone Pipe Co. v. United States*, 175 U. S. 211.

The court held further that the question of intent was not material. If the necessary direct and immediate effect of such contracts be to violate the act of Congress, and also to restrain and regulate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. The design is immaterial. The important element is the fact of the existence of the contract of a direct and substantial regulation of interstate commerce. *Ib.*

**Tile Trust.**— The case of *Montague v. Lowry*, 193 U. S. 35, was brought by a private citizen against a combination engaged in the manufacture of tiles, grates, and mantels to recover treble damages under section 7 of the Sherman Act. Plaintiffs in that case claimed that they had been boycotted by the trust and were unable to purchase goods except from members of the combine at "list prices," which was 50 per cent. higher than was charged to members of the combine. The case is fully reported under section 7, page 299, *post*.

**Merger Case — Combination of Carriers Illegal.**— The case of the *United States v. The Northern Securities Co.* was brought to restrain and invalidate an agreement or combination having for its object the consolidation or merger of two carriers, corporations engaged in interstate commerce operating competing lines of transcontinental railway between the Great Lakes and the Pacific ocean, and to dissolve the combination as in violation of the provisions of the Sherman Act.

The suit was begun by the Attorney-General of the United States on behalf of the government under the "Expedition Act" of February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the circuit where the suit is brought when the Attorney-General files with the clerk of the court wherein the case was pending a certificate that it is one of "general public importance." The certificate was filed, and in accordance with the statute the case was "given precedence over others, and in every way expedited."

The suit was tried in United States Circuit Court, district of Minnesota, third division, before Judges CALDWELL, SANBORN, THAYER, and VAN DEVANTER, and resulted in a decree rendered April 9, 1903, all the judges concurring, in favor of the United States for the relief prayed for, declaring the combination complained of illegal and void. (120 Fed. Rep. 721.) Defendants appealed directly to the Supreme Court under the act of February 11, 1903. The case was there reached and argued December 14th and 15th of the same year. It was decided March 14, 1904. From the time of the rendition of the original decree below till the cause was argued in the Supreme Court, the total time consumed under the "Expedition Act" of February 11, 1903, was eight months and five days.

The point decided in the *Merger* case was that a contract or agreement whereby a holding corporation was created, to which the stockholders of two competing parallel lines, contrary to the constitution and laws of the States, creating such competing companies, agreed to transfer the stock of both roads and turn it over to the holding company, creates a trust prohibited by the Federal statute. Such a contract is an agreement or conspiracy among stockholders of competing lines which restrains



interstate commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them, and is unlawful and in direct violation of the provisions of the Sherman Act.

In such a transaction the purchase of the stock of the companies is a mere incident. Such purchase is simply a means to accomplish an unlawful purpose, to-wit, to destroy competition between carriers and create a monopoly of the traffic. *Northern Securities Company v. United States*, 193 U. S. 197.

**Merger Case Considered.**—In the bill filed by the Attorney-General in behalf of the United States in the *Merger* case, the defendants were the Northern Securities Company, a New Jersey corporation, a holding company, the Great Northern Railway Co., a Minnesota corporation, the Northern Pacific Railway Co., a Wisconsin corporation, and a number of individuals who were controlling stockholders of the defendant companies. It set forth the agreement resulting from the creation of the holding company, whereby the stockholders of the competing lines of railroad operated by defendant carrying corporations, agreed to transfer the stock of both carrying companies to the holding company, which was not engaged in operating any railroad or carrying on interstate commerce, and alleged that the object of the transaction was to restrain trade and commerce among the States by destroying competition between the carrying companies and to put both lines under the control of the holding company, which was created solely for that purpose.

The facts disclosed on the trial showed that the two great railways sought to be merged were engaged in active competition for freight and passenger traffic across the continent, through the northern tier of States from Minnesota and the Great Lakes to the Pacific ocean, the two lines including branches aggregating about 9,000 miles of road, each road connecting at its respective terminals with lines of railway, with lake and river steamers, and with sea-going vessels. The terms of the agreement of merger in effect provided that the holders of stock of the competing companies should turn it over to the *holding* company to effect a complete consolidation of both roads. Thus, "by making the stockholders of each system jointly interested

in both systems and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of directors and officers of each system in a common body, to-wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

It was alleged also in the bill that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railroad companies. The exchange value of the stock of the latter was \$400,000,000. The subscribed capital of the holding company was but \$30,000, but its authorized capital was \$400,000,000, which was \$122,000,000 in excess of the par value of the stock of both companies. Four hundred million dollars represented the exchange value of the railroad stock. This stock of the holding company was to be issued for the stock of both companies, 55 per cent. of which would go to holders of Great Northern, and the balance, 45 per cent., to holders of Northern Pacific stock.

Upon the pleadings and proofs, the lower court, in an elaborate and exhaustive opinion by Judge THAYER, concurred in by all the judges, sustained the bill and granted the relief substantially as prayed for. The Supreme Court affirmed the decree in a comprehensive opinion by Mr. Justice HARLAN, concurred in by Justices BROWN, McKENNA, and DAY. Mr. Justice BREWER also voted for affirmance, writing a separate concurring opinion.

Justice WHITE wrote a dissenting opinion concurred in by Chief Justice FULLER, and Justices PECKHAM and HOLMES, the latter writing also a separate dissenting opinion.

**The Naked Right to Acquire Stock not Questioned.**—It was argued in behalf of defendants in the *Merger* case that the matter complained of was a mere business transaction as to the purchase of stock with which the government of the United States had no concern. In their behalf it was urged that, after

all, the main question involved was the right of the Northern Securities Company, a New Jersey corporation, to acquire and hold stock in other State corporations. Mr. Justice HARLAN, in this connection, observed that no person contended that Congress could control the mere acquisition or mere ownership of stock in a State corporation engaged in interstate commerce. That the government complained, not of the purchase of stock, but of the existence of a combination among stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee designed to act for both companies in repressing free competition between them. "Independently of any question of the mere ownership of stock, or of the organization of a State corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act."

**Dividends on \$122,000,000 of Watered Stock.**— It was argued in the *Merger* case that there was no intention on the part of defendants to create a monopoly or to restrain trade or commerce. In this connection it will be observed that the *par value* of the stock of the two competing railroads was \$278,000,000. That the *exchange* value was \$400,000,000. It was shown that the stockholders of the two railroad companies would receive for their stock certificates to be issued by the Northern Securities Company aggregating \$400,000,000, which was the amount of stock it was authorized to issue. In this transaction the holders of railroad stock would receive not \$278,000,000 of securities' stock, but \$400,000,000 of the latter. In other words, the railroad stockholders would get not only the par value of their stock, but by way of bonus, \$122,000,000 of watered stock.

It will be observed that by pooling the earnings of both railroads for the benefit of the holders of Northern Securities stock, care would be taken that the holding corporation was vested with power which made it the duty of the securities company to promote not the interests of one system at the expense of the other, but of both at the expense of the public. The stockholders, in the language of Justice HARLAN, "will take care that no persons are chosen directors of the holding company who will



permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act — ‘combination in the form of a trust or otherwise \* \* \* in restraint of commerce.’ ”

The earning of the two railroads is the only source from which must come the money with which to pay a dividend on the \$122,000,000 of watered stock in the hands of the combine. The money must come from the shipper and consumer — the general public — for there is no other source.

**The Holding Company a Mere Device.**— In further answer to the argument that Congress had no power to prohibit the mere acquisition or ownership of stock in a corporation engaged in interstate commerce, Mr. Justice HARLAN observes that the government makes no such contention, and takes no such position. The question, and the only question, concerned the real nature of the transaction and the purposes sought to be accomplished by it. The claim of the government was that the holding company was a mere device to cover an unlawful combination to destroy competition between carriers. The principal was applied, that what is forbidden to be done directly, cannot be accomplished indirectly. The court says:

“The purpose of the combination was concealed under very general words that gave no clew whatever to the real purposes of those who brought about the organization of the securities company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between competing parallel lines of interstate carriers, all would have seen at the outset that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress. \* \* \* It cannot be said that any State may give a corporation created under its laws authority to restrain interstate or international

commerce against the will of the nation as lawfully expressed by Congress. \* \* \*

“The stockholders of these two competing companies disappeared as such for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interest of both sets of stockholders as a unit and to manage, or cause to be managed, both lines of railroad as if held in *one ownership*. Necessarily by this combination or arrangement the holding company, in the fullest sense, dominates the situation in the interests of those who were stockholders of the constituent companies; as much so for every practical purpose as if it had been itself a railroad corporation which had built, owned, or operated both lines for the exclusive benefit of its stockholders. Necessarily also, the constituent companies ceased under such a combination to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation by the name of a holding corporation, the principal if not the sole object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. *Northern Securities Co. v. United States*, 193 U. S. 197.

**Concurring Opinion.**—BREWER, J.—Mr. Justice BREWER voted for affirmance in a separate concurring opinion in which he said, that while he could not assent to all that was said in the opinion of Justice HARLAN, he deemed the agreement to merge the carrying corporations an unreasonable combination in restraint of interstate commerce. Justice BREWER said in part:

“Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended. \* \* \*

“There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the

control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the securities company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the securities company was a mere incident, the manner in which the combination to destroy competition, and thus unlawfully restrain trade, was carried out."

**Territory Affected by Merger Decision.**—The territory affected by the railway combination attempted through the instrumentality of the Northern Securities Company, as trustee for the merged lines, embraced eighteen States between the Great Lakes and the Pacific ocean, to-wit: Illinois, Wisconsin, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Kansas, Nebraska, Colorado, Wyoming, Montana, Utah, Idaho, Nevada, California, Oregon, and Washington. It was shown that prior to the attempted merger, and with a view to their final consolidation, the Northern Pacific and Great Northern companies united in the purchase of the stock of the Chicago, Burlington and Quincy Railway Company, giving in payment upon an agreed basis of exchange the joint 4 per cent. bonds of the Great Northern and Northern Pacific, payable in twenty years. This gave the combination control, by its main line and branches, of the territory indicated connecting at Omaha, Kansas City, Cheyenne, Denver, Helena, Spokane, and Portland with the Union Pacific system.

The merger agreement, therefore, while it did not embrace within its terms the Union Pacific lines, gave the combination



practical control of its territory in the States indicated. The map in the front of the book shows the territory reached and embraced within the proposed combination of the Northern Pacific and Great Northern, and the Chicago, Burlington and Quincy, aggregating, including main line and branches, about 9,000 miles of road. (See map facing Preface.)

**Merger Injunction.**—The injunction granted in the *Merger* case, embracing the relief prayed for by the government, is as follows:

“That the Northern Securities Company, its officers, agents, servants, and employees, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends\* to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring

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\* The injunction as to payment of dividends was subsequently modified in so far as to permit the payment of the dividends pending appeal, upon defendant giving a bond for \$50,000, conditioned to prosecute the appeal and pay all damages resulting from the order of modification.

to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which the said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

**Professional Comment — Views of Judge Dillon on Merger Decision.**— The general interest everywhere manifested by the *Merger* decision was reflected in the public press. Public men and prominent lawyers were interviewed and contributed to the discussion. Some of their observations are valuable as indicating the views of the legal profession throughout the country on a question of universal interest and importance. Governor Van Zandt, of Minnesota, who led the fight in the suit brought by his State seeking to prevent a similar merger, declared that in his opinion the decision meant more to the people of Minnesota and the Northwest than any event since the civil war. The views of counsel for other great railway systems are of special interest, in view of the fact that there have been many consolidations and assignments of leases of railway companies in accordance with State laws. In such cases, however, it has always been claimed that they were sanctioned by the laws of the States where the consolidation or merger took place, and that the transactions did not directly restrain interstate commerce. In this connection, the views of Hon. John F. Dillon, former judge of the United States Circuit Court, are interesting. Judge Dillon is known as one of the foremost railroad lawyers, and represents the Gould interests. He is a well-known author, having written "Dillon on Municipal Corporations" and other valuable works, including his "American Jurisprudence."

From the standpoint of counsel for a vast system of railways the views of Judge Dillon will attract attention. His opinion on the *Merger* decision was sought by the New York HERALD. He prepared for that great newspaper the following statement, which was published in its issue of March 15, 1904:



**Decision not a Precedent.**—“Every judicial decision must be construed with reference to the particular facts on which such decision is rendered. The *Northern Securities* case, in its facts, is limited to a case of a corporation not owning any railway, and not organized to do any business of its own, and not having any substantial capital of its own, but created expressly to act as a custodian or holder of the shares of two parallel and competing railroad companies, and to control the same through the corporate organization of such holding company, contrary to the Constitutions and statutes of the States which created such parallel and competing companies.

“For no other case would this *Northern Securities* be what lawyers would call a precedent; that is, it would not necessarily control cases not like it in its essential facts. The *Northern Securities* decision, therefore, has no necessary application to ordinary railway consolidations, leases, and purchases authorized to be made and made in conformity with the laws of the States which created the railways and in which they are situated.

**Majority Opinion Logical.**—“The opinion of the majority of the court in the *Northern Securities* case is the necessary or almost inevitable logical effect of the prior decisions of the Supreme Court in the *Trans-Missouri Association* and *Joint Traffic* cases. In those cases, notwithstanding the arguments against the views which a majority of the court reached, which were made by Mr. Phelps, Mr. Choate, Mr. Carter, and myself, a majority of the court reached the conclusion that the Sherman Anti-Trust Act included all contracts in restraint of interstate commerce or trade, even though such contracts were in and of themselves reasonable.

“Considering the judges who took part in the *Trans-Missouri Association* and *Joint Traffic* cases, and the judges taking part in the recent *Northern Securities* decision, I cannot interpret the recent decision otherwise than as marking, or if not actually marking, foreshadowing a recession from the extreme high-water mark of those cases, in so far as they hold that the Anti-Trust Act of Congress prohibits any and all reasonable arrangements, even though they are not in restraint of trade — a recession that, it seemed to me, was bound to come.

**Decision will Prove a Benefit.**—“All the circumstances, as well as the language of the various judges in the recent opinions, make it clear to my mind that the *Northern Securities* case is not a precedent; that is, that it will not necessarily control any other case where the facts are essentially different. Thus viewed this decision should not cause alarm or unsettle railway values. Thus limited — to express simply my own impressions and views — it will probably prove in the long run a benefit to railway properties and investments and possibly to the public at large.



*“Uncontrolled power in a few men by any form of corporate device to control the railway systems of a great country is a power too great to be compatible with the public weal, and one which would not be permanently endured by the people.”*

“Confining the case to its precise circumstances, and extending it no further, I answer your question as to whether it has the approval of my judgment as a lawyer by saying yes, and I repeat that I do not think it can successfully be used to defeat pre-existing or other arrangements made under the authority of the laws of the several States in the way of consolidations, leases, and otherwise which were not intended to, and do not directly — mark my words, I say directly — actually interfere with interstate commerce.”

**The Beef Trust.**— One of the most formidable of the modern industrial combinations whose transactions have been the subject of judicial inquiry is the combination familiarly called the Beef Trust. It is more widely known than other combinations, for the reason that its operations affect the meat supply of the country. The price of meat presents a question of universal interest. It is claimed that in committee the trust daily fixes the price. The litigation with respect to the legality of this combination is pending in the Supreme Court of the United States, but has not yet been argued. The trust suffered defeat in the United States Circuit Court, northern district of Illinois, in a suit brought in behalf of the United States, in which Judge GROSSCUP, applying the rules laid down in the *Addystone Pipe* case in which the mode of transacting business was similar to that employed by the beef trust, granted an injunction perpetual, forbidding the continuance of the acts of defendants set forth in the bill.

The court, in granting the relief prayed for, held that commerce includes the sale or exchange of commodities, but is not restricted to specific acts of sale or exchange. It includes intercourse — all the initiatory and intervening acts, instrumentalities, and dealings — which bring about such sale or exchange. When such commerce is between parties from different States, or is affected by transportation from State to State, it becomes “commerce between the States” which Congress has power to regulate within the meaning of the Sherman Act. *United States v. Swift*, 122 Fed. Rep. 529 (April, 1903, Cir. Ct. No. Dist. Ill.).

The case cited arose upon demurrer to the bills, and a motion by plaintiff for an injunction. The court overruled the demurrers and granted a preliminary injunction restraining the acts complained of. It was alleged that defendants, who included seven corporations, one co-partnership, and twenty-three other persons, controlled 60 per cent. of the trade in fresh meats in the United States. They were engaged in the purchase of live stock from various States, which were converted into fresh meat which was sold by defendants, or through their agents, to consumers in different States. These facts were held to constitute interstate commerce. The court held that the character of such transactions is not altered by the fact that the fresh meats in the hands of agents may be subject to ordinary State taxation. Because an article of commerce can be taxed it does not follow, from that fact alone, that it is not subject to Federal control as interstate commerce. Commerce, whether interstate or domestic, is subject to the police power and taxing power of the State. So long as the exercise of such power does not restrain or regulate interstate commerce and Federal control it may be lawfully exercised. *Addystone Pipe Co. v. United States*, 175 U. S. 211; *Austin v. Tennessee*, 179 U. S. 349; Prentice & Egan on Commerce Clause, page 27. *Ib.*

**Beef Trust an Unlawful Combination.**—On the branch of the case in which defendants claimed that they were not an unlawful combination, it was alleged that they were guilty of the following acts: (a) Directing their purchasing agents to refrain from bidding against each other at auction sales of live stock; (b) in bidding up the price of such stock for a few days at a time to induce large shipments, and then ceasing to bid to obtain the stock thus shipped at less than ruling-market prices; (c) in agreeing upon prices to be adopted by all, and restricting the output or quantities of meat shipped; (d) in directing uniform prices for cartage and delivery throughout the United States as a device to increase the price to dealers and consumers, and (e) in negotiating with carriers for secret rebates on their enormous shipments, thus bringing about unjust discrimination against other shippers and competitors for the purpose of stifling and destroying competition. The court, GROSSCUP, J., held that these facts con-

stituted an unlawful combination and conspiracy within the meaning of the Sherman Act because it was in restraint of trade and commerce. Whether such restraint was, or was not, unreasonable was wholly immaterial. *United States v. Trans-Missouri Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 558. The court held that the bill of complaint charged an unlawful conspiracy and combination in restraint of trade and commerce within the meaning of the Sherman Act, overruled the demurrers interposed by defendants, and granted a preliminary injunction. *United States v. Swift*, 122 Fed. Rep. 529 (April, 1903, Cir. Ct. No. Dist. Ill.).

**Pleadings — Beef Trust Case.**— The petition filed on behalf of the United States in the Beef Trust case may be summarized as follows:

*First.* "That at the time of its filing they had been and then were engaged in the business of buying live stock at divers points throughout the United States, where stockyards existed, and slaughtering the same at such places in different States and converting the same into fresh meats for human consumption.

*Second.* "That they had been and then were engaged in the business of selling such fresh meats at the places where prepared, to dealers and consumers in divers other States and Territories of the United States and in foreign countries, and shipping the same when so sold, from said places of preparation to such dealers and consumers, pursuant to such sales, and were thus engaged in trade and commerce among the several States and Territories and with foreign nations.

*Third.* "That they had been and then were engaged in the business of shipping such fresh meats from said points where so prepared, by common carriers to the respective agents of the defendants located at and near the principal markets of such meats in other States and Territories and in foreign countries for sale by those agents in those markets to dealers and consumers, which they there sold through their agents and were thus engaged in trade and commerce among the several States and Territories and with foreign nations.

*Fourth.* "That of the total volume of trade and commerce among the said States and Territories in fresh meats the said defendants together controlled about 60 per cent.

*Fifth.* "That as to such trade and commerce among the several States and Territories and foreign nations in fresh meats, the said defendants should, and but for the acts hereinafter complained of would be, and remain in competition with each other.



*Sixth.* "That said defendants, in violation of the act of Congress of July 2, 1890, chap. 647, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200), and in order to restrain competition among themselves as to the purchase of live stock necessary to the production of the meats produced by them, have engaged in and intended to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stockyards and markets where they customarily purchase such live stock, which live stock is produced and owned principally in other States and Territories of the United States, and shipped by the owners thereof to such stockyards for competitive sale, to refrain from bidding against each other when making purchases of such live stock, and by these means inducing and compelling the owners of such live stock to sell the same at less prices than they would receive if such bidding were competitive; which combination and conspiracy is in restraint of trade and commerce among the several States, etc.

*Seventh.* "That said defendants, in further violation of said act, and in order to further restrain competition among themselves, which would otherwise exist, as to the purchase of live stock necessary to the production of the meats produced by them, have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up through their agents the prices of live stock for a few days at said stockyards, thereby inducing shippers from other States and Territories to make large shipments of such live stock to such stockyards, and then refrain from bidding up such live stock, and thereby obtaining such live stock at prices much less than it would bring in the regular way of trade.

*Eighth.* "That said defendants, in further violation of said act, and in order to restrain and destroy competition among themselves as to such trade and commerce and to monopolize the same, have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily, from time to time, lower and fix prices, and maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout said States and Territories and foreign countries. That the arbitrary raising, lowering, fixing, and maintaining of said prices is effected through the action of divers of their agents in secretly holding periodical meetings, and there agreeing upon the prices to be adopted by said defendants respectively in such trade and commerce, which said prices are notified by letters and telegrams, and are adhered to in their sales, which are made directly, and among other ways; and by collusively restricting and curtailing the quantities of such meats shipped by them in pursuance of such combination, and imposing

against each other divers penalties for any deviations from such prices, and establishing a uniform rule for the giving of credit to dealers throughout the said States and Territories and foreign countries, and for the conduct of the business of such dealers, with penalties for violation thereof, by notifying each other of the delinquencies of said dealers, and keeping what is commonly known as a 'black list' of such delinquents, and refusing to sell meats to any of such delinquent dealers.

*Ninth.* "And the said defendants, in violation of the provisions of the said act, have engaged in, and intend to continue, an unlawful combination and conspiracy, to direct and require their respective agents at and near many of the markets for such fresh meats throughout the United States and Territories to arbitrarily make and impose uniform charges for cartage for delivery, upon making such sales to dealers and consumers in those markets of the meats shipped to them through said agents by the said defendants respectively from their several points of preparation, thereby increasing the charges for such meats to said dealers and consumers.

*Tenth.* "That notwithstanding the common carriers by railroad subject to the provisions of the laws of the United States for the regulation of commerce have established and published their schedule of rates, fares, and charges for the transportation of live stock, and for the transportation of meats, which are the only lawful rates for such transportation, the said defendants, intending thereby to monopolize the commerce aforesaid, and prevent competition therein, have made and are making agreements and arrangements with divers officers and agents of such common carriers whereby the said defendants were to receive, and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation, less than the lawful rates, which rebates they divide among themselves and will continue to do so unless restrained by the injunction of this court, which is a scheme to monopolize, and also a combination and conspiracy in restraint of trade and commerce among the several States and Territories and with foreign nations.

*Eleventh.* "That the said defendants now are, and for years past have been, in combination and conspiracy with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its Territories and foreign countries, to that end the defendants do and will artificially restrain such commerce and put in force abnormal, unreasonable and arbitrary regulations for the conduct of their own and each other's business, effecting the same from the shipment of the live stock from the plains to the final distribution of

the meats to the consumer. All to the injury of the people and in defiance of law."

**Grounds of demurrer.**—To this petition five of the defendant corporations filed joint and several demurrers, the grounds of which are as follows:

"The bill of complaint does not allege any contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce within the meaning of said act of Congress of July 2, 1890, chap. 647, 26 Stat. 209 (U. S. Comp. Stat. 1901, p. 3200).

"The bill of complaint does not allege any acts of defendants monopolizing or attempting to monopolize, or combining or conspiring to monopolize any part of such trade or commerce within the meaning of said act.

"If the act of Congress in question should be given a construction which would sustain this bill of complaint such act would violate the provisions of the Constitution of the United States.

"Said bill is multifarious.

"There is a misjoinder of causes of action and of persons in said bill, as alleged in said demurrers.

"The said bill of complaint and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite."

**Beef Trust Injunction.**—The injunction was granted by Judge GROSSCUP in the *Swift* case in April, 1903, and was made permanent May 26, 1903. The injunction is as follows:

"That [names defendants, seven corporations, one co-partnership, and twenty-three other persons] and each of them, their respective agents and attorneys and all persons acting or claiming to or assuming to act under their authority, or that of any of them, be enjoined and restrained from entering into, taking part in, or performing any contract, combination, or conspiracy, the purpose or effect of which will be as to trade and commerce in fresh meats a restraint of trade or commerce among the several States, Territories and the District of Columbia, either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock, or collusively and by agreement refraining from bidding against each other at such sales or by arbitrarily raising or lowering prices, or fixing uniform prices at which said meats will be sold, either directly or indirectly through their respective agents, or by curtailing the quantity of such meats shipped to such mar-



kets and agents, or by imposing penalties for deviations from prices; or by establishing and maintaining uniform rules for the giving of credit to dealers in such matters, or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, or by any other method or device the purpose and effect of which is to restrain trade and commerce as aforesaid."

The second paragraph of the injunction enjoined them from receiving rebates from railroad companies, the effect of which was to give them a monopoly by making it impossible for outsiders to compete.

**Coal Trust Illegal.**— A contract was made by a number of persons engaged in mining coal and making coke, whereby a corporation agreed to take the entire output of the mines and ovens of the other parties, which is intended for the "western shipment." It also agreed to sell the same in certain States at not less than a minimum price to be fixed by an executive committee under the contract, the seller agreeing to pay over to the producers the entire proceeds over a fixed price per ton, the selling corporation agreeing to keep the overplus as and for its compensation. The purpose of the agreement was stated to be "to enlarge the Western Market."

The Attorney-General filed a bill in equity to dissolve the combination, and for an injunction perpetual to enjoin the execution of the contract as an unlawful conspiracy in restraint of trade. *Held*, that the contract, in so far as it affected interstate trade and commerce was in restraint of trade and commerce, and was illegal and void. That the agreement was in actual restraint of trade and commerce, and that an injunction issue restraining defendants from selling and shipping coal and coke into other States under the contract, and that the combination of defendants thereunder be dissolved. (August 31, 1900.) *United States v. Chesapeake Co.*, 105 Fed. Rep. 93.

**Act Retroactive.**—The Sherman Act operates upon contracts in existence at the time of its passage. The fact that such agreements were made prior to the passage of the act is immaterial. The statute creates a remedy, and if the mischief to be corrected exists, the courts may apply the remedy, even though the contract giving rise to the acts complained of were made before the act was passed. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

**Act Applies to Common Carriers.**— The Sherman Act applies to every contract or combination in restraint of interstate or foreign commerce, whether made or entered into by common carriers engaged solely in transportation or by persons or corporations engaged in the manufacture, purchase, and sale of commodities. The act prohibits agreements if they are in restraint of such trade, whether the agreements in themselves are reasonable or unreasonable. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

Eighteen railroad companies operating competing lines formed an association designated the Trans-Missouri Freight Association for the purpose of establishing and maintaining uniform rates and preventing rate cutting, and providing penalties to be imposed upon members for a violation of its rules. The agreement did not provide for pooling freights or dividing the aggregate proceeds of the pool. In that regard the agreement did not violate the Interstate Commerce Act. (§ 5.) The agreement was filed with the Interstate Commerce Commission, and the schedule of rates therein agreed upon was posted and published. The United States filed a bill praying for a dissolution of the association, and to have the agreement declared illegal as in restraint of trade and commerce in violation of the Sherman Anti-Trust Law. That it was oppressive, intended to increase rates, and stifle competition, and created a monopoly. Defendants claimed that the agreement was not forbidden by the Interstate Commerce Act, that the Sherman Act did not apply to common carriers, and that the agreement was in itself reasonable and just, and that the association had been dissolved pending the appeal. The bill was dismissed below; the judgment affirmed in the Circuit Court of Appeals. The Supreme Court reversed the judgment, and held that by its terms the Sherman Act embraced every contract in restraint of trade, whether made by common carriers or manufacturers and dealers engaged in the purchase and sale of commodities. That if the agreement complained of was in restraint of trade, it was condemned by the act whether it was regarded in itself as reasonable or unreasonable. That the Sherman Act did not conflict with the Interstate Commerce Act, but was in harmony with it. *Ib.*

It was held further that the mere fact that the association

had been dissolved pending the appeal did not oust the court of jurisdiction to pass upon the validity of the agreement complained of. That the United States had rights with respect to the questions involved, of which it could not be deprived by acts of defendants in voluntarily dissolving their association. *Ib.*

**Injunction — Violation of Sherman Act will not Defeat Right to.**— The charge that a plaintiff seeking an injunction to restrain defendant from manufacturing or selling certain electrical appliances in violation of plaintiff's patents is guilty of a violation of the Sherman Anti-Trust Law of July 2, 1890, is no reason why the court should not restrain defendant from infringing the patent. It is difficult to understand, said the court, how or why a violation of the Sherman Anti-Trust by this complainant, if there has been such a violation, confers any right on defendant to infringe this patent, nor will the fact that defendants are amply responsible and able to respond in damages defeat plaintiff's right to an injunction which is the appropriate and adequate remedy. *Gen. Electric Co. v. Wise*, 119 Fed. Rep. 922.

**Ticket Scalping — Pooling as a Defense to an Action against Ticket Brokers.**— It is a defense to a suit in equity brought by the carrier for an injunction to restrain defendants, who were ticket brokers, from selling portions of non-transferable tickets at cut rates, that plaintiffs in issuing such tickets were guilty of an unlawful conspiracy against trade and commerce in violation of the Sherman Act. *Delaware Railroad v. Frank*, 110 Fed. Rep. 689 (August, 1901, Cir. Ct. No. Dist. N. Y.).

Plaintiff, a carrier and citizen of Pennsylvania, sued sixty-one defendants, alleging that they were citizens of New York doing business at Buffalo, for an injunction to restrain them from selling non-used portions of excursion tickets for a round trip to the Pan-American Exposition at Buffalo, which tickets were issued at reduced rates and were made non-transferable, and good only for a limited period. The tickets were issued by plaintiff in conjunction with other carriers. Defendants objected to the jurisdiction on the ground that some of the defendants were citizens of Pennsylvania, the same State in which plaintiff re-



sided, as to whom the court had no jurisdiction, there being no diversity of citizenship, and no Federal question being involved. That in dismissing the bill as to some of the defendants the court must dismiss as to all for want of jurisdiction. Defendants claimed also that in issuing the tickets, which were the subject of the injunction sought, defendants, in conjunction with other carriers, were engaged in an unlawful combination and conspiracy in open violation of the Anti-Trust Law, known as the Sherman Act, in pooling issues and creating a monopoly. Defendants claimed that he who comes into equity must come with clean hands, and that plaintiff could not violate the law, in issuing tickets, and then invoke the power of a court of equity to secure the aid of such court to enable it to consummate and continue their unlawful acts. It was claimed that plaintiff was a member of the "Trunk Line Association" and was also a member of the "Trunk Line Committee." That the association was engaged in pooling railway rates and fares for transportation, to avoid competition between the several lines controlled by the association, which acted through a trunk line passenger committee, composed of the general passenger agents of the principal roads. That the rates and conditions of the Pan-American round-trip excursion tickets were fixed by such combinations arranged to stifle competition in rates and an agreed *pro rata* division of all receipts from the sale of such tickets. That plaintiff acted also in conjunction with the Central Passenger Association. These facts were not denied. *Ib.*

The court held, that upon the undisputed facts, the tickets, which were the subject-matter of the action, were issued in pursuance of a combination and agreement expressly forbidden by law. The plaintiff could not invoke the aid of a court of equity to enable them to consummate an act which the law forbids, and which is declared to be unlawful. That complainant did not come before the court with clean hands and must, therefore, be relegated to a court of law. Injunction vacated. *Ib.*

As to the question of jurisdiction the court held that it might dismiss the bill as to those residing in the same State in which plaintiff resided, and retain jurisdiction as to the remaining defendants, if this could be done without prejudice to the remain-

ing defendants, and the presence of the excluded defendants was not essential or indispensable or prejudicial to the entry of a decree against the remaining defendants. *Ib.*

**State Anti-Trust Law — Provisions of, cannot be Invoked Collaterally.**— Before a defendant can evade the payment of purchase price of commodities actually received on the ground that the seller is a trust or combination in restraint of trade contrary to the provisions of a State statute (Anti-Trust Law of Illinois, act of 1891), there should be an adjudication of a competent tribunal in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination within the statute. When sued for the purchase price of commodities, the defendant cannot, by way of defense, plead that plaintiff is a trust within a State statute as the issue pleaded is *collateral* to issue tendered by the plaintiff. *Lafayette Bridge Co. v. City of Streator*, 105 Fed. Rep. 729.

**§ 2. Misdemeanor to Combine.**— Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**Criminal Liability — Imprisonment.**— Section 2 of the Sherman Act which declares a violation of its provisions to be a misdemeanor, prescribes imprisonment as one of the penalties. The court may impose a fine not exceeding \$5,000 or imprisonment not exceeding one year, or both fine and imprisonment in the discretion of the court.

The imprisonment penalty was abolished by section 1 of the Elkins Act (*ante*, page 134) in so far only as relates to violations of the Interstate Commerce Act or section 1 of the Elkins

Act. The clause of the latter act, however, abolishing imprisonment as a penalty, does not in terms extend to the Sherman Act or to any of its provisions. It abolishes the punishment by imprisonment only in case of convictions under the Interstate Commerce Act or amendments thereto, or for offenses under section 1 of the Elkins Act.

**§ 3. Contract in Restraint of Trade, Illegal — Penalty.**— Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**§ 4. Remedy Injunction — Jurisdiction of Federal Court.**— The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case



and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

**Witnesses must Testify.**—Prior to the act approved February 25, 1903, there was no way in which a witness could be compelled to testify in a proceeding under the Sherman Act before the grand jury as to the witnesses' connection, participation in, or knowledge concerning a combination to regulate commerce, and control the price of commodities. *Foot v. Buchanan*, 113 Fed. Rep. 156 (January, 1902, Cir. Ct. No. Dist. Miss. W. D.).

The court held that section 860 of U. S. Rev. Stat. which provides that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court in any criminal proceeding, for the reason that the section in question contains no specific provision that such witness shall not be prosecuted for the offense which may be disclosed by his testimony, and that the provisions of the act of February 11, 1893, applied only to the Interstate Commerce Act and had no application to the Sherman Act. *Ib.*

In view of the ruling that the Sherman Act was practically inoperative by reason of the difficulty in securing evidence in proceedings to enforce its provisions Congress, in the act of February 25, 1903, appropriating half a million dollars to enable the Attorney-General and the Department of Justice to prosecute proceedings under the Sherman Act and the Interstate Commerce Act, extended to the former as well as the latter the provisions of the act declaring that no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts.

The decisions holding that this language declaring expressly

that a witness shall not be prosecuted, is sufficient to authorize the court to compel the witness to testify and produce books, papers, and documents, when properly subpoenaed, are now applicable under the Sherman Act.

These decisions will be found under section 12 of the Interstate Commerce Act, *ante*, page 184 *et seq.*

The provisions of chapter 755, Laws 1903, approved February 25th of that year, appropriates \$500,000 to enforce the Commerce Act and Anti-Trust Laws, and takes away the right to prosecute a witness "who shall testify or produce evidence documentary or otherwise" under either the Interstate Commerce Act, the Sherman Act, or the anti-trust provisions of the Wilson Bill. These provisions of the statute are as follows:

**Witnesses under Sherman Act not to be Prosecuted.**— That for the enforcement of the provisions of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all Acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said Acts in the courts of

the United States: *Provided*, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (*Laws 1903, chap. 755, approved February 25, 1903.*)

§ 5. **Additional Parties may be Brought in.**— Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 6. **Trust Property, when Confiscated.**— Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 7. **Suits by Injured Parties — Treble Damages.**— Any person who shall be injured in his business or property by any other person or corporation by reason of anything



forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

**Commercial Boycott — Treble Damages.**—Any person injured in his business by reason of any act, combination, or conspiracy, condemned or forbidden by the Sherman Act, may bring an action under section 7 for damages in a Circuit Court of the United States, irrespective of the amount in controversy, and shall recover threefold damages, the costs, and an attorney's fee. A commercial boycott, whereby a syndicate or trust dealing in tiles, grates, and mantels, shipped from other States, undertook to discriminate against a dealer not a member of the association, was held to be within the purview of the Sherman Act. *Montague v. Lowry* (February, 1904), 193 U. S. 38. Edward S. Lowry & Co., plaintiffs in the case cited, claiming to have been damaged by the boycott, sued the officers of the Tile, Mantel and Granite Association of California, and the association, the offending trust, in a Circuit Court of the United States in San Francisco, under the Sherman Act for the injury claimed to have been sustained by the boycott. Plaintiffs were wholesale dealers in tiles, mantels, and grates in San Francisco. Defendants and constituent members of the trust were also dealers in the same articles. No tiles were manufactured in California and plaintiffs and those defendants who did business in California purchased their goods from manufacturers in other States, who were made defendants in the action. All tiles purchased by the California parties were shipped from outside the State. The business so conducted was held to constitute interstate commerce.

The combination or syndicate complained of was formed in 1898. It was an unincorporated association governed by a constitution and by-laws, which provided substantially as follows:

**Constitution of the Tile Trust.**—The constitution which governed the association, article I, section 1, provided that any in-

dividual, corporation, or firm engaged in or contemplating engaging in the tile, mantel, or grate business in San Francisco, or within a radius of 200 miles thereof (not manufacturers), having an established business and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws governing the association. The initiation fee was, for active members, \$25, and for non-resident members, \$10, and each active member of the association was to pay \$10 per year as dues, but no dues were charged against non-residents.

An executive committee was to be appointed whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000.

**By-Laws of the Tile Trust.**—The by-laws of the defendant association in the *Montague* case, after providing for the settlement of disputes between members and customers by reason of liens, foreclosure proceedings, etc., enacted in article III as follows:

SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than "list prices" to any person or persons not a member

of this association, under penalty of expulsion from the association.

SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel & Grate Association of California, shall forfeit their membership in the association.

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tile were sold by a member to any one not a member, they were sold at the list prices so adopted, which were more than 50 per cent. higher than when sold to a member of the association.

**Tile Trust Illegal.**— Plaintiffs proved that prior to the formation of the trust they did a profitable business and were competitors of all the defendants who were dealers in tiles in San Francisco. Prior to the formation of the trust plaintiffs purchased all their tile from manufacturers in eastern States (who were defendants in the action) all of whom had subsequently joined the trust. That after the trust was formed plaintiffs could not purchase tile from the manufacturers at any price, but were obliged to purchase them from San Francisco dealers at "list prices" which was 50 per cent. over the price at which members of the trust could purchase them. That before the trust was formed plaintiffs could purchase tile, and did purchase tile from the manufacturers at much less cost than it was possible for them to do after the trust association was formed. Plaintiffs showed that they were not members of the trust, never had been, never applied for membership, and had never been asked to join. That there were members of the association who were hostile to plaintiffs and that it required a unanimous vote to secure membership. Defendants showed that the condition in constitution requiring members to carry not less than \$3,000 worth of stock had not always been enforced, but there was no proof that the provision had been repealed. Plaintiff had a verdict for \$500 which was trebled, and the court after five days' trial, on proof that the value of the services was from \$750 to \$1,000, awarded plaintiffs and an attorney's fee of \$750. Affirmed at Court of Appeals and in Supreme Court.



The court, Mr. Justice PECKHAM writing the opinion, held, unanimously, that the result of the agreement entered into by the trust when carried out was to prevent dealers in tiles in San Francisco, not members of the association, from purchasing the same on any terms from any of the manufacturers who were such members from whom plaintiffs had purchased tile prior to the formation of the association. That by the agreement a non-member of the association was prevented from purchasing tile from San Francisco dealers who were members, unless upon paying a greatly enhanced price over what he would have paid manufacturers or San Francisco dealers prior to the formation of the association. "The agreement, therefore," says PECKHAM, J., "restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member." The court observed also that it was not a simple agreement of manufacturers, refusing to sell to certain other persons. It was an agreement between manufacturers and dealers belonging to the association not to purchase from manufacturers not members, and not to sell unset tile to any one not a member for less than a "list price" which was 50 per cent. higher than prices charged to members; while manufacturers who were members agreed not to sell to any one not a member. The sale of unset tile in California ceases to be a State transaction because it forms part of a scheme with manufacturers in other States to enhance prices, and the agreement is not separable, but must be construed as a whole. Plaintiffs could not be compelled to join the association even if they could do so, and could not be legally put under obligation to become members in order to enable them to transact business. The award of the attorney's fee was discretionary, and no abuse of discretion was shown in awarding it. *Montague v. Lowry*, 193 U. S. 38.

**Treble Damages — Member of Combination cannot Sue for.**  
— The provisions of section 7 of the Sherman Act which declares that any person, who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared unlawful by the act, may sue and recover treble

damages for the injuries sustained has no application to one who is himself a party to the trust. *Bishop v. American Preserves Co.*, 105 Fed. Rep. 845.

Plaintiff was a party to a contract to form a corporation to purchase and control the manufacture of preserves throughout the United States, and was obliged to transfer his plant and factory to the corporation. Disagreements and disputes having arisen in the corporation plaintiff brought replevin to recover the property he had transferred to the trust, and alleged that defendant was an illegal combination in restraint of trade. *Held on demurrer*, that plaintiff being himself a member of the combination could not maintain the action. *Ib.*

§ 8. **Persons Defined.**— That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

**Anti-Trust Provisions of Wilson Bill.**— The Wilson Bill (Laws 1894, chap. 349), which became a law without the President's approval, August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the government, and for other purposes," contained certain provisions forbidding unlawful restraints and monopolies by and between importers or persons or corporations engaged in importing "any article from any foreign country into the United States, when designed to operate in restraint of lawful trade or free competition in lawful trade or commerce, "or to increase the market price in any part of the United States" of imported articles, or "of any manufacture into which such imported article enters or is intended to enter." A violation of the act is declared to be a misdemeanor, punishable by fine or imprisonment. A remedy by injunction is also provided, and an action for treble damages to any person injured.

When a new tariff bill was passed in 1897, entitled "An Act to provide revenue for the government and to encourage the in-

dustries of the United States," known as the Dingley Bill (Laws 1897, chap. 11, approved July 24, 1897), Congress expressly retained in full force and virtue the sections of the Wilson Bill (sections 73, 74, 75, 76, and 77) relating to trust agreements entered into by importers, and these sections of the Wilson Bill are still in force. The anti-trust provisions of the Wilson Bill are as follows:

§ 73, Wilson Bill.—Trusts and Monopolies by Importers.—That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any court of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.



**§ 74, Wilson Bill.— Remedy — Injunction, Jurisdiction of Federal Court.**— That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

**§ 75, Wilson Bill.— Additional Parties may be Brought in.**— That whenever it shall appear to the court before which any proceeding under the seventy-fourth section of this Act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

**§ 76, Wilson Bill.— Trust Property, when Confiscated.**— That any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section seventy-three of this Act, and being in the course of transpor-

tation from one State to another, or to or from a Territory, or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 77, Wilson Bill.— **Suit by Injured Parties — Treble Damages.**— That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

**Wilson Bill Continued by Dingley Bill.**— Section 34 of the Dingley Bill (Laws 1897, chap. 11) continues in force the anti-trust provisions of the Wilson Bill, by the following proviso:

*And provided further,* That nothing in this Act shall be construed to repeal or in any manner affect the sections numbered seventy-three, seventy-four, seventy-five, seventy-six, and seventy-seven of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," which became a law on the twenty-eighth (should be twenty-seventh) day of August, eighteen hundred and ninety-four. (Dingley Bill, § 34, approved July 24, 1897.)

## CHAPTER IV.

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### BUREAU OF CORPORATIONS.

**The Act Creating Bureau of Corporations and Authorizing Publicity with Regard to the Business and Management of Corporations. Entitled An Act to Establish the Department of Commerce and Labor. Laws 1903, Chap. 552. Approved February 14, 1903.**

In order to secure reasonable publicity in regard to the management and business of corporations engaged in interstate commerce, except carriers under the Interstate Commerce Act, and as a supplement to the Sherman Anti-Trust Law, Congress, by the Act entitled "An Act to establish the Department of Commerce and Labor" (Statutes, chap. 552), approved February 14, 1903, placed such business and manufacturing corporations, and joint stock companies or associations under the supervision of an officer designated the Commissioner of Corporations. The Act confers upon the Commissioner powers analogous to those exercised by the Interstate Commerce Commission with respect to corporations engaged as common carriers of interstate commerce. This Bureau and its Commissioner are under the jurisdiction and control of the Secretary of Commerce and Labor. The statute creating this Bureau and the officers having charge of its business (section 6), provides as follows:

**Bureau of Corporations — Its Officers.**— That there shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Corporations, and a Commissioner of Corporations who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum. There shall also be in said bureau a deputy commissioner who shall receive a salary of three thousand five hundred dollars per annum and who shall



in the absence of the Commissioner act as, and perform the duties of, the Commissioner of Corporations, and who shall also perform such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the said Commissioner. There shall also be in the said bureau a chief clerk and such special agents, clerks, and other employees as may be authorized by law. (Commerce and Labor Act of February 14, 1903, § 6.)

**Power of Commissioner of Corporations.**—The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to “An act to regulate Commerce,” approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public. (Commerce and Labor Act of February 14, 1903, § 6.)

**Powers Same as Powers of Interstate Commerce Commission.**—In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock com-

panies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said "Act to regulate commerce" and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said "Act to regulate commerce" and by "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said "Act to regulate commerce," shall also apply to all persons who may be subpoenaed to testified as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section. (Commerce and Labor Act of February 14, 1903, § 6.)

**Publication of Information.**— It shall also be the province and duty of said bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law. (Statutes 1903, chap. 552, approved February 14, 1903, § 6.)

**Purpose of the Statute.**— Congress has no control of a corporation created under the laws of a State and engaged wholly in

domestic commerce. Congress has exclusive supervision of the business of interstate commerce when conducted by such a corporation in a manner to restrain trade or commerce among the States or with foreign nations. In many States corporations are not required to make reports which will disclose their financial condition. Many great industrial corporations transact business aggregating millions annually. They issue their capital stock upon which handsome dividends are sometimes paid. This stock is listed or offered in the open market, and investors are invited to buy. Often those who purchase such stocks for investment are obliged to rely entirely upon the business standing and commercial integrity of the directorate. A prudent investor seeks information as to the value of the assets and earning capacity of a corporation, upon which to base his judgment as to the value of the stock or securities offered.

In many instances, however, millions are invested in stocks of a corporation, the reason for the purchase being based altogether on the character of the men who control and manage its affairs. One who invests under such circumstances, in the language of the Street, puts his money into a "blind pool." There seems to be no adequate legal method of getting all the information a prudent investor requires under such circumstances, although in some States the laws require every corporation to furnish detailed statements and proper security which will safeguard the investors' interests. In many States, however, adequate safeguards are not provided and the information desired must be secured, if at all, through expensive and tedious litigation.

Many of the great combinations of capital and syndicated wealth engaged in commercial pursuits claim that secrecy is absolutely essential to success. That information which is open to the public is open to the competitor and business rival, and that unless a measure of secrecy is preserved success is difficult if not impossible.

The combinations of great industrial businesses operating in every State of the Union, and in every country in the world, may be so conducted by an alliance with the carriers to create a monopoly, destroy competition, enhance prices, and drive out of business rivals not absorbed by the trust. To remedy this phase of exclusive commercialism Congress passed the Sherman Act,



July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." The cases in which the power of the Supreme Court of the United States has been invoked to restrain and dissolve these unlawful combinations are reported *ante* under the Sherman Act. The court has decreed a number of such combinations to be unlawful, has ordered their dissolution, and authorized the Circuit Courts of the United States to grant relief by mandatory injunction, prohibiting the unlawful acts complained of shown to be in violation of the statute.

Complaints have been made that the remedies provided by the act of Congress and applied by the courts are being constantly evaded; that injunctions do not seem to prohibit, although the letter of the law may be complied with. It is charged that the methods employed by powerful syndicates are such as to make it impossible to *get the evidence* necessary to secure the remedies which the law affords. The claim is made that the weapons of the trusts are the "boycott," the "black list," and the employment of the most potent of all weapons, an alliance with the great carriers to secure the granting of rebates which make competition with the trust extremely difficult if not impossible. That it is impossible to secure witnesses or get persons who have suffered damage to make complaints for fear that their business will be ruined or their means of livelihood taken away through the secret methods employed by those against whom redress is sought.

A court cannot act without evidence. A statute cannot be framed to remedy an evil unless all the facts surrounding the case are disclosed. The authorities, whether the courts or the Legislature, cannot act without reliable information.

The object of the act creating a department of commerce and labor was to create an official agency giving the government of the United States full power and authority to secure the information necessary, not only to protect the investor who has purchased the stock of a corporation, but to enable such action by the courts or by the Legislature as may be necessary to enforce the laws to "protect" commerce, or to frame such new legislation as may be proper to that end.

Diligent investigation is the object and aim of the statute affecting "*the organization, conduct, and management of the*

business of any corporation, joint stock company, or corporate combination," excepting only common carriers engaged in interstate commerce.

The powers conferred upon the Commissioner of Corporations in the performance of his duties under the act are identical with the powers conferred on the Interstate Commerce Commission under the Interstate Commerce Act, including the right to compel witnesses to testify and produce books and papers. The law giving a cabinet officer supervision over all corporations except common carriers with respect to interstate commerce is experimental. It has been suggested by the necessities and conditions arising from a monopoly of trade and commerce by vast aggregations of capital, whereby not only is competition practically destroyed, but thousands are deprived of the opportunity to engage in business or pursue their callings. In other words the great object of a republican form of government, based upon the fundamental principle of equality of opportunity, is in a measure defeated by the absolute denial of opportunity.

**Necessity of Means to Secure Evidence.**—The importance of this new law giving a department of the government power to investigate, and affording the means of securing reliable information is illustrated by the action of the *United States v. Swift*, 122 Fed. Rep. *ante*, page 286, known as the beef trust. The injunction issued in that case by Judge GROSSCUP, *ante*, page 289, it was supposed would be adequate to secure the relief sought and open the markets to the stockraisers and grain growers of the West. The result has shown that conditions remain about as they were before the injunction was issued. How is it that the mandatory order of a United States court seems apparently ineffectual? It is believed that the diligent investigation which the Commissioner of Corporations is required to make may furnish an answer to the inquiry. Such investigation has been made, and is being made, and the results are expected to be laid before Congress at its next session.

**Market Price of Beef.**—The unreliable character of the information as to the cause of fluctuation in the price of meat and live stock, gathered from officers of the constituent companies in the trust, is illustrated, by inter-

views recently secured by representatives of the New York HERALD, which instituted a very thorough investigation of the subject. That enterprising journal published such information as it was able to obtain from representatives of the packers with regard to the inquiry as to how it happened that the cattle raiser receive such insignificant prices for his stock, while the consumer was compelled to pay so much. In answer to these inquiries the HERALD of July 3, 1904, says:

J. Ogden Armour, head of the corporation of Armour & Co., was asked this question recently. His answer was:

"The high price of beef is due to the fact that the live stock production of the United States has not kept pace with the increase in the population."

Louis Swift, president of Swift & Co., was asked why it is that the cattle growers of South Dakota, Montana, Iowa, Nebraska, Kansas, and Texas receive hardly enough for their cattle to pay for the corn fed while fattening them. His answer was:

"The high prices paid for cattle in 1902 persuaded many farmers to load up with a lot of fatteners. The ranges were filled and the result was overproduction. The supply is greater than the demand, and in consequence the price of beef on the hoof has fallen."

Another explanation is that offered by an employee of the International Packing Company, one of the few independents still remaining in the field. The International has been in the hands of a receiver and it is well understood that when its affairs are finally settled it will be absorbed by the trust. For that reason those connected with the concern refuse to permit the use of their names. One of those seen by a reporter for the HERALD said:

"The reason why the prices of cattle are low and the prices of dressed meats are high is that competition has been stifled by the beef trust. Arbitrary prices are made both ways. The cattle raiser, the retail butcher, and the consumer are all at the mercy of the trust. The machinery of the beef trust is perfect. A 'gentlemen's agreement' has taken the place of the written contracts that existed two years ago. It matters little to the cattle grower whether he receives one bid for his beeves or four bids, so long as only one price is quoted to him.

"The beef trust has the cattle grower at its mercy. It controls the stock yards at Kansas City, St. Joseph, St. Louis, Omaha, Sioux City, St. Paul, Chicago, Fort Worth, and the various smaller cities of the country. The beef trust controls the facilities for shipping, and it has, by the creation of the National



Packing Company, taken from the field all of the independent concerns. Mr. Armour was wrong when he said that the reason why beef is high is that the live stock production has not kept pace with the increase in population. Mr. Swift was wrong when he said that the reason why the prices paid for cattle are low is because there has been an overproduction. The lack of competition is the true reason."

As yet there has been no judicial interpretation defining the limitation of the powers and authority conferred on the Commissioner of Corporations, and to what extent this power may be constitutionally exercised. It may be observed, however, that the power is not broad enough to compel corporations doing an interstate business to make public statements of their affairs to enable investors to be sufficiently advised before purchasing corporate stock, as to the assets and resources which would indicate the value of the stock secured by such assets.

#### **Other Provisions of the Act Creating Bureau of Corporations.**

— The first part of the statute (Laws 1903, chap. 552), entitled "An Act to establish the Department of Commerce and Labor" which creates the Bureau of Corporations and a Commissioner of Corporations, and places them under the supervision and control of a Cabinet officer, namely the Secretary of Commerce and Labor, is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there shall be at the seat of government an executive department to be known as the Department of Commerce and Labor, and a Secretary of Commerce and Labor, who shall be the head thereof, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall receive a salary of eight thousand dollars per annum, and whose term and tenure of office shall be like that of the heads of the other Executive Departments; and section one hundred and fifty-eight of the Revised Statutes is hereby amended to include such Department, and the provisions of title four of the Revised Statutes, including all amendments thereto, are hereby made applicable to said Department. The said Secretary shall cause a seal of office to be made for the said Department of such device as the President shall approve, and judicial notice shall be taken of the said seal.*

**SEC. 2. Assistant Secretary of Commerce.**— That there shall be in said Department an Assistant Secretary of Commerce and

Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or required by law. There shall also be one chief clerk and a disbursing clerk and such other clerical assistants as may from time to time be authorized by Congress; and the Auditor for the State and other Departments shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of Commerce and Labor, and of all bureaus and offices under his direction, all accounts relating to the Light-House Board, Steamboat-Inspection Service, Immigration, Navigation, Alaskan fur-seal fisheries, the National Bureau of Standards, Coast and Geodetic Survey, Census, Department of Labor, Fish Commission and to all other business within the jurisdiction of the Department of Commerce and Labor, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of Commerce and Labor.

**SEC. 3. Duty of Department.**—That it shall be the province and duty of said Department to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, the labor interests, and the transportation facilities of the United States; and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law. All unexpended appropriations, which shall be available at the time when this act takes effect, in relation to the various offices, bureaus, divisions, and other branches of the public service, which shall, by this Act, be transferred to or included in the Department of Commerce and Labor, or which may hereafter, in accordance with the provisions of this Act, be so transferred, shall become available, from the time of such transfer, for expenditure in and by the Department of Commerce and Labor and shall be treated the same as though said branches of the public service had been directly named in the laws making said appropriations as parts of the Department of Commerce and Labor, under the direction of the Secretary of said Department.

**SEC. 4. Officers, Bureaus, and Divisions.**—That the following-named offices, bureaus, divisions, and branches of the public service, now and heretofore under the jurisdiction of the Department of the Treasury, and all that pertains to the same, known as the Light-House Board, the Light-House Establishment, the Steamboat-Inspection Service, the Bureau of Navigation, the United States Shipping Commissioners, the National Bureau of Standards, the Coast and Geodetic Survey, the Commissioner-



General of Immigration, the commissioners of immigration, the Bureau of Immigration, the immigration service at large, and the Bureau of Statistics, be, and the same hereby are, transferred from the Department of the Treasury to the Department of Commerce and Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named Department; and that the Census Office, and all that pertains to the same, be, and the same hereby is, transferred from the Department of the Interior to the Department of Commerce and Labor, to remain henceforth under the jurisdiction of the latter; that the Department of Labor, the Fish Commission, and the Office of Commissioner of Fish and Fisheries, and all that pertains to the same, be, and the same hereby are, placed under the jurisdiction and made a part of the Department of Commerce and Labor; that the Bureau of Foreign Commerce, now in the Department of State, be, and the same hereby is, transferred to the Department of Commerce and Labor and consolidated with and made a part of the Bureau of Statistics, hereinbefore transferred from the Department of the Treasury to the Department of Commerce and Labor, and the two shall constitute one bureau, to be called the Bureau of Statistics, with a chief of the bureau; and that the Secretary of Commerce and Labor shall have control of the work of gathering and distributing statistical information naturally relating to the subjects confided to his Department; and the Secretary of Commerce and Labor is hereby given the power and authority to rearrange the statistical work of the bureaus and offices confided to said Department, and to consolidate any of the statistical bureaus and offices transferred to said Department; and said Secretary shall also have authority to call upon other Departments of the Government for statistical data and results obtained by them; and said Secretary of Commerce and Labor may collate, arrange, and publish such statistical information so obtained in such manner as to him may seem wise.

That the official records and papers now on file in and pertaining exclusively to the business of any bureau, office, department, or branch of the public service in this Act transferred to the Department of Commerce and Labor, together with the furniture now in use in such bureau, office, department, or branch of the public service, shall be, and hereby are, transferred to the Department of Commerce and Labor.

**SEC. 5. Bureau of Manufactures.**—That there shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Manufactures, and a chief of said bureau, who shall be appointed by the President, and who shall receive a salary of four thousand dollars per annum. There shall also be in said



bureau, such clerical assistants as may from time to time be authorized by Congress. It shall be the province and duty of said bureau, under the direction of the Secretary, to foster, promote, and develop the various manufacturing industries of the United States, and markets for the same at home and abroad, domestic and foreign, by gathering, compiling, publishing, and supplying all available and useful information concerning such industries and such markets, and by such other methods and means as may be prescribed by the Secretary or provided by law. And all consular officers of the United States, including consuls-general, consuls, and commercial agents, are hereby required, and it is made a part of their duty, under the direction of the Secretary of State, to gather and compile, from time to time, useful and material information and statistics in respect to the subjects enumerated in section three of this Act in the countries and places to which such consular officers are accredited, and to send, under the direction of the Secretary of State, reports as often as required by the Secretary of Commerce and Labor of the information and statistics thus gathered and compiled, such reports to be transmitted through the State Department to the Secretary of the Department of Commerce and Labor.

## CHAPTER V.

### TELEGRAPH COMPANIES.

**Act in Aid of Railroad and Telegraph Lines, entitled "An Act Supplementary to the Act of July 1, 1862, entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line From the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes,' and also the Act of July 2, 1864, and Other Acts Amendatory of Said First Named Act." Approved August 7, 1888.**

#### ANALYSIS OF STATUTE.

- SEC. 1.** Railroad company alone must operate telegraph over its line by its own corporate officers.
2. Any telegraph company may connect with existing lines — Equal facilities compulsory.
  3. Interstate Commerce Commission may enforce statute — May secure writ of *mandamus*.
  4. Attorney-General shall enforce rights of government — May annul unlawful contracts.
  5. Violation of the statute a misdemeanor — Party aggrieved may sue for damages.
  6. Contracts to be filed with Interstate Commerce Commission — Annual Reports — Penalties.
  7. Right to amend act reserved.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:*

§ 1. Railroad must Operate Telegraph by Its Own Officers. — That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the acts incor-

porating them, or by any act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain, and operate, for railroad, Governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid. (*Laws 1888, chap. 772, approved August 7, 1888.*)

**Act of July 1, 1862, etc.**—The provisions of the act of August 7, 1888, is supplementary to prior legislation on the subject. This legislation, as recited in the title of the act of August 7, 1888, is now embraced in Title LXV of the United States Revised Statutes, sections 5263–5269, inclusive. These provisions, together with the act of 1888, embrace the legislation governing telegraphs. The provisions of the United States Revised Statutes are as follows:

**SEC. 5263. Public Domain Open to any Company.**—Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

**SEC. 5264. Right to Take Timber and Land.**—Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which their



lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

**SEC. 5265. Rights not Transferrable.**— The rights and privileges granted under the provisions of the act of July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or under this Title, shall not be transferred by any company acting thereunder to any other corporation, association, or person.

**SEC. 5266. Government Messages.**— Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster-General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

**SEC. 5267. Government may Purchase Lines.**— The United States may, for postal, military or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or under this Title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

**SEC. 5268. Company must File Acceptance.**— Before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by law.

**SEC. 5269. Penalties.**— Whenever any telegraph company, after having filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the act approved July twenty-four, eighteen hundred and sixty-six, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," or by this Title, shall, by its agents or employes, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this Title, or

by the provisions of section two hundred and twenty-one, Title "The Department of War," authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and seaboard of the approach and force of storms, such telegraph company shall be liable to a penalty of not less than one hundred dollars and not more than one thousand dollars for each such refusal or neglect. (To be recovered by an action or actions at law in any District Court of the United States.)

**Telegraph Controlled by Congress.**— A State has no power to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence over territory within its own jurisdiction. A State law cannot confer exclusive rights upon a telegraph company, or create a telegraph monopoly. Congress has exclusive control over the telegraph, where it affects communication from a point in one State to points in another, because such transmission of intelligence is an essential agency of interstate commerce, and Congress having legislated on the subject, all State laws in conflict with an act of Congress are void. *Pensacola Tel. Co. v. Western Union Tel. Co.* (October, 1877), 96 U. S. 1.

"The electric telegraph," says Chief Justice WAITE in the case cited, "marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions.

"Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new devel-



opments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation.

“In fact, from the beginning it seems to have been assumed that Congress might aid in developing the system, for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago (opinion written October, 1877), with money appropriated by Congress for that purpose (5 Stat. 618), and large donations of land and money have since been made to aid in the construction of other lines.” *Ib.*

**State Cannot Create Telegraph Monopoly.**—The case cited involved the right of the State of Florida to grant to a telegraph company the exclusive right to operate within the State. The plaintiff below, the Pensacola Telegraph Company, had an exclusive grant from the Florida Legislature to operate telegraph lines in counties of Escambia and Santa Rosa in that State. These counties lay between the southern boundary of Alabama and the northern coast of the Gulf of Mexico. Pensacola was a seaport in Santa Rosa county, on the Gulf coast, on the Bay of Pensacola.

The defendant, the Western Union Telegraph Company, was incorporated under the laws of New York. It had complied with the act of Congress of July 24, 1866,\* authorizing telegraph companies organized under the laws of any state, on complying with the terms of the act, to operate lines of telegraph “over any portion of the public domain” over and along any military or post

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\* The act of July 24, 1866, is now embraced in title 65 of the United States Revised Statutes, §§ 5263–5269. For the text of these sections see *ante*, pages 319–321.



road of the United States, or over, under, or across navigable streams or waters of the United States. In addition to this authority conferred by the act of Congress, the Western Union company secured also from the Pensacola and Louisville railroad the right to erect a telegraph line on its right of way from the Bay of Pensacola to the State of Alabama, thence connecting with other lines. The defendant on receiving such rights and authority from the railroad company, and in conformity also with the provisions of the act of July 24, 1866, commenced to erect a telegraph line from the city of Pensacola north through Santa Rosa county, in which territory plaintiff claimed an exclusive right to operate telegraph lines under the Florida statute. On July 27, 1874, plaintiff filed a bill in the Circuit Court of the United States for the northern district of Florida, praying for an injunction perpetual to restrain the defendant from building or operating its line within the territory within which plaintiff claimed exclusive rights, and from which the Legislature of Florida sought to exclude all others. Upon the pleading and evidence the Circuit Court dismissed the bill, holding that defendant having complied with the act of Congress which authorized it to build its line in the territory claimed by plaintiff, the Florida statute giving to plaintiff an exclusive grant over the territory, was void, as in conflict with the Federal statute, the subject-matter of which related to interstate commerce.

On appeal the Supreme Court of the United States affirmed the decree, holding that there was no power in the Florida Legislature to make an exclusive grant to plaintiff of the right to operate a telegraph line upon or over territory within the State, since Congress had legislated on the subject and the Florida statute conflicted and was repugnant to the act of Congress. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

"The government of the United States," said the chief justice, "within the scope of its powers operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by States lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all." *Ib.*

**A Telegraph Company Is a Carrier.**—A telegraph company occupies the same relation to commerce as a carrier of messages

that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits. *Telegraph Co. v. Texas*, 105 U. S. 460.

**Taxation by State of Telegraph Company.**— Messages sent by a telegraph company out of the State is a tax on interstate commerce, and a statute of a State imposing such tax is unconstitutional and void. *Telegraph Co. v. Texas*, 105 U. S. 460.

The Constitution of Texas authorized its Legislature to “impose occupation taxes, both upon natural persons and upon corporations other than municipal doing business in the State. A Texas statute (Art. 4655, Rev. Stat.) declared that every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full-rate message sent, and one-half of one cent for every message less than full rate. Under this act the Western Union Telegraph Company between October 1, 1879, and July 1, 1880, was taxed on 169,076 full rate, and on 100,408 less than full rate messages. A large portion of these were sent out of the State. Some messages were sent by government officers on public business. The company refused to pay the tax and was sued in the State court and judgment was recovered against it on the ground that the Texas statute was valid. This judgment was sustained by the Supreme Court of Texas. On writ of error to the Supreme Court of the United States the judgment was reversed as to messages sent out of the State and as to government messages, on the ground that the statute of Texas, in assuming to tax such messages, was without power, and its statute was void. *Ib.*

Chief Justice WAITE, in his opinion, observed that “if a tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such so far as it operates on private messages sent out of the State it is a regulation on foreign and interstate commerce and beyond the power of the State. As to the government

messages it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers. *McCullough v. Maryland* (4 Wheat. 316), and therefore void." *Ib.*

See also to same effect *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640.

**State Law as to Messages Operates only within the State.—**

The manner in which a telegraph company conducts its business in different States cannot be governed by a State statute. A State law as to mode of delivering messages cannot operate as to a breach of its provisions in another State, and its provisions cannot be enforced except for violations in the State in which the law was enacted. *Western Union Tel. Co. v. Pendleton* (May, 1887), 122 U. S. 347; *Western Union Tel. Co. v. James* (May, 1896), 162 U. S. 650.

In the *Pendleton* case the court was required to construe a statute of the State of Indiana which required telegraph companies to deliver dispatches, by messenger, to the persons to whom they are addressed or to their agents if they reside within one mile of the telegraph station or within the city or town in which the station is. Such a statute cannot operate without the State, as it would constitute a regulation with regard to interstate commerce which the State has no power to make.

William Pendleton, the plaintiff, sent a telegram from Shelbyville, Ind., to Ottumwa, Iowa, on April 14, 1883. The message was sent at thirty-five minutes past 5 in the afternoon. The defendant received the message at Ottumwa at 7:30 P. M. James Harker, in whose care the message was sent, lived more than a mile from the telegraph station in Ottumwa. Defendant, as was its custom, if the person addressed lived more than a mile from the station, put the message in the post-office in Ottumwa and it was delivered to the sendee next morning by the postmaster at about 9 A. M. The Indiana statute (§ 4176, Rev. Stat. Ind. 1881) required every telegraph company to deliver messages "with impartiality and in good faith, and in the order of time in which they are received," under penalty of \$100 for failure to transmit, or if delayed or postponed.

Plaintiff claimed to have suffered damage by the delay of the message, and sued defendant under the Indiana statute for fail-



ure to deliver the message in the sum of \$100 in the State court of Indiana. Defendant's answer set forth the duties and liabilities of defendant in the State of Iowa, which required it to transmit messages without unusual delay, and willful failure to deliver was declared a misdemeanor. On demurrer to the answer plaintiff had judgment for \$100, which was affirmed by the Supreme Court of Indiana. On writ of error to the Supreme Court of the United States the judgment was reversed on the ground that the Indiana statute, in so far as it attempted to regulate the mode in which messages sent in Indiana, should be delivered in other States, was void, as its operation affected a regulation of interstate commerce. *Western Union Tel. Co. v. Pendleton* (May, 1887), 122 U. S. 347.

**State Law; when Operative within the State.**— A State has power to pass a law requiring a telegraph company to promptly transmit and deliver messages within the State, under a penalty of \$100. Such a statute is valid only within the State, and can be enforced within the State as a valid exercise of its police power.

The Legislature of Georgia passed a law requiring a telegraph company during usual office hours to receive all dispatches, and on payment of usual charges to "transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of \$100" to be recovered by suit in any court having jurisdiction. That statute further declared that the act should not be construed so as to impair right of party to recover damages for breach of contract or duty by any telegraph company, which damages might be recovered in the same suit.

Plaintiff, a cotton merchant living at Blakely, Ga., on November 4, 1890, wired Tullis & Co. at Eufaula, Ala., offering to sell cotton on terms named in the message. Tullis received the message the same day, and sent a telegram to Blakely accepting his offer. This message was received by defendant at Blakely late in the evening of November 4th. Defendant did not deliver it till the next morning, November 5th. Plaintiff claimed that the message was not delivered by defendant with due diligence and that as a result of the delay he suffered damage. He sued defendant in the State court of Georgia under the Georgia statute for the \$100 penalty and also for \$242.60 damages. At

the trial plaintiff recovered both the penalty and the damages. On appeal to the Supreme Court of Georgia the judgment was sustained as to the penalty, but reversed as to the damages, and plaintiff having remitted the claim for damages the judgment as to the penalty of \$100 under the statute was affirmed.

A writ of error was sued out by defendant to the Supreme Court of the United States where the judgment was affirmed and the Georgia statute upheld as a valid exercise of the police power of the State. *Western Union Tel. Co. v. James* (May, 1896), 162 U. S. 650.

Mr. Justice PECKHAM distinguished the *Pendleton* case (122 U. S. 347). He observed that in the case cited, the State court sought to enforce an Indiana statute outside and beyond the territorial limits of the State. "That statute," says Mr. Justice PECKHAM, referring to the Indiana law, "was held to conflict with the clause of the Constitution of the United States which vests in Congress power to regulate commerce among the States in so far as it attempted to regulate the delivery of such dispatches to places situate in other States, and it was said that the reserved police power of the State, under the Constitution, although difficult to define, did not extend to the regulation of the delivery at points without the State of telegraphic messages received within the State." *Ib.*

**The Georgia Statute Construed.**—In construing the Georgia statute, as to the question of the penalty and the damages imposed, Mr. Justice PECKHAM said:

"It is true it provides a penalty for a violation of its terms and permits a recovery of the amount thereof irrespective of the question whether any actual damages have been sustained by the individual who brings the suit; but that is only a matter in aid of the performance of the general duty owed by the company. It is not a regulation of commerce, but a provision which only incidentally affects it. We do not mean to be understood as holding that any State law on this subject would be valid, even in the absence of congressional legislation, if the penalty provided was so grossly excessive that the necessary operation of such legislation would be to impede interstate commerce. Our decision in this case would form no precedent for holding valid such legisla-

tion. It might then be urged that legislation of that character was not in aid of commerce, but was of a nature well calculated to harass and to impede it. While the penalty in the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the State to enact. \* \* \*

“Again it is said that this company entered into a valid contract in Alabama with the sender of the message, which provided that it would not be liable for mistakes in its transmission beyond the sum received for sending the message, unless the sender ordered it to be repeated and paid half the sum in addition, and this statute changed the liability of the company as it would otherwise exist. The message was not repeated. This kind of a contract, it is said, was a reasonable one, and has been so held by this court. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1. This, however, is not an action by the person who sent the message from Alabama, and this plaintiff is not concerned with that contract, whatever it was. There was no mistake in the transmission of the message, and there was no breach of the agreement. The action here is not founded upon any agreement and the judgment neither affects nor violates the contract mentioned. Nor are we here concerned with the provisions of the third section of the act relating to the damages to be recovered in the case of cipher messages. This was not such a message, and this judgment is solely based upon the penalty granted by the statute for non-delivery, and could be sustained even if the third section of the act were not valid, which is a question we do not decide nor express any opinion concerning it. The residue of the act could stand without the third section.” *Ib.*

**Text of the Georgia Statute.**—The Georgia statute, the validity of which was upheld in the case cited, is entitled: “An Act to prescribe the duty of electric telegraph companies as to receiving and transmitting despatches, to prescribe penalties for violations thereof, and for other purposes.” The text of the statute is as follows:

**Messages to be Delivered with Diligence.**—“Sec. 1. Be it enacted by the general assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, every electric telegraph company with a line of wires,



wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and, on payment of the usual charges according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue: *Provided*, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit.

**One-Mile Clause.**—"Sec. 2. Be it further enacted, that such companies shall deliver all dispatches to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same. *Provided*, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is.

**Cipher Messages.**—"Sec. 3. Be it further enacted, that in all cases the liability of said companies for messages in cipher, in whole or in part, shall be the same as though the same were not in cipher.\*

**Repealer.**—"Sec. 4. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are hereby, repealed."

**§ 2. Any Telegraph Company may Connect with Existing Lines.**—That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this act, said telegraph company so extending its lines shall have the right and said railroad or telegraph company [**Equal Facilities Compulsory**] shall allow the line of said telegraph com-

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\* The Supreme Court in the *James* case did not construe section 3 of the Georgia statute, and declared expressly that it purposely refrained from expressing any opinion as that section.

pany so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

**§ 3. Interstate Commerce Commission may Enforce Statute.**

— That if any such railroad or telegraph company referred to in the first section of this act, or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain, and operate a telegraph line as provided in this act and acts to which this is supplementary, for the use of the Government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be, under such rules and regulations as said Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or tele-

graph company concerned shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same [**May Secure Writ of Mandamus**] by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners: *Provided*, That the said Commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

§ 4. **Attorney-General shall Enforce Rights of Government.**  
— That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, [**May Annul Unlawful Con-**



tracts] and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

§ 5. Violation of Statute a Misdemeanor.— That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies, who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this act and by the acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the Government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and, on conviction thereof, shall in every such case be fined in a sum not exceeding one thousand dollars, and may be imprisoned not less than six months; and in every such case of refusal or failure [**Party Aggrieved may Sue for Damages**] the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be

guilty thereof, in the circuit or district court of the United States in any State or Territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such State or Territory, and such service shall be held by the court good and sufficient.

§ 6. **Contracts to be Filed with Interstate Commerce Commission.**— That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies [**Annual Reports**] annually hereafter to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use, and operation thereof, and its

relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such reports or any report as may be called for by said Commission, or refuse to submit its books and records for inspection, such neglect or refusal [**Penalties**] shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the Attorney-General of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

§ 7. **Right to Amend Acts Reserved.**—That nothing in this act shall be construed to affect or impair the right of Congress, at any time hereafter, to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal as, in the opinion of Congress, justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster-General now has under title sixty-five of the Revised Statutes to fix rates, or, of the Government, to purchase lines as provided under said title, or to have its messages given precedence in transmission.



## CHAPTER VI.

### SAFETY APPLIANCE LAW.

#### Act to Promote Safety of Employees and Traveling Public.

ENTITLED

“An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes.”— Approved March 2, 1893.

#### ANALYSIS OF STATUTE.

- SEC. 1. Equipment includes power, driving-wheels and air-brakes.
2. Automatic couplers coupling automatically by impact.
  3. Carrier may refuse unequipped cars from other lines.
  4. Grab-irons and hand-holds required.
  5. Draw-bars for freight cars — Standard height prescribed.
  6. Penalties ; how recovered.
  7. Extension of time for compliance with act ; how granted.
  8. Employee, when not deemed guilty of negligence.
1. Safety Appliance Law extended by act of March 2, 1903.
  2. Power of Interstate Commerce Commission — Penalties.
  3. Application of act of 1893.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:*

§ 1. **Power Driving-Wheels — Train Brakes.**— That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-

wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

§ 2. **Automatic Couplers.**— That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

§ 3. **Carrier may Refuse Unequipped Cars.**— That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

§ 4. **Grab Irons and Handholds.**— That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in

the ends and sides of each car for greater security to men in coupling and uncoupling cars.

§ 5. **Drawbars — Standard Height Prescribed.**— That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

NOTE.— Prescribed standard height of drawbars: Standard-gauge roads,  $34\frac{1}{2}$  inches; narrow-gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

§ 6. **Penalties, how Recovered.**— That any such common carrier using any locomotive engine, running any



train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred: and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended by Act approved April 1, 1896.)

§ 7. **Extension of Time.**— That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

§ 8. **Employee, when not Deemed Negligent.**— That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary

to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

**Supplemental Act of March 2, 1903.**— The provisions of the Safety Appliance Law of 1893 was supplemented by an Act approved March 2, 1903, so as to extend its provisions to the Territories and the District of Columbia. The supplemental Act is entitled "An Act to amend an act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six." The provisions of the Act of 1903 are as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:*

§ 1. **Act Extended to Territories, and District of Columbia.**  
— That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of

the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

§ 2. Power of Interstate Commerce Commission — Penalties.— That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.



§ 3. **Application of Act of 1893.**— That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

**RULES OF PRACTICE BEFORE THE COMMISSION IN  
CASES AND PROCEEDINGS UNDER THE ACT  
TO REGULATE COMMERCE.**

**I.**

**Public Sessions.**

The general sessions of the Commission for hearing contested cases will be held at its office in the Sun Building, No. 1317 F street NW., Washington, D. C., on such days and at such hour as the Commission may designate.

When special sessions are held at other places, such regulations as may be necessary will be made by the Commission.

Sessions for receiving, considering, and acting upon petitions, applications, and other communications, and also for considering and acting upon any business of the Commission other than the hearing of contested cases, will be held at its said office at 11 o'clock a. m. daily when the Commission is in Washington.

**II.**

**Parties to Cases.**

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or the railroad commissioner or commission of any State or Territory, may complain to the Commission by petition, of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier or carriers subject to the provisions of said act. Where a complaint relates to the rates or practices of a single carrier, no other carrier need be made a party, but if it relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are proper parties defendant.

Where a complaint relates to rates or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates or practices on each of said lines, all the carriers operating such lines must be made defendants.

When the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Persons or carriers not parties may petition in any proceeding for leave to intervene and be heard therein. Such petition shall

set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding, but no person, not a carrier, who intervenes in behalf of the defense, shall have the right to file an answer or otherwise become a party, except to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel on the argument of the case.

### III.

#### Complaints.

Complaints of unlawful acts or practices by any common carrier, made in pursuance of section 13 of the act to regulate commerce, must be by petition, setting forth briefly the facts claimed to constitute a violation of the law. The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition. The complainant must furnish as many copies of the petition as there may be parties complained against to be served.

The Commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served, personally or by mail in its discretion, upon each carrier complained against.

### IV.

#### Answers.

A carrier complained against must answer within twenty days from the date of the notice above provided for, but the Commission may, in a particular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by special order of the Commission. The original answer must be filed with the Secretary of the Commission at its office in Washington, and a copy thereof at the same time served, personally or by mail, upon the complainant, who must forthwith notify the Secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a carrier complained against shall make satisfaction before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgment



must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the carrier.

#### V.

##### **Notice in Nature of Demurrer.**

A carrier complained against who deems the petition insufficient to show a breach of legal duty, may, instead of answering, or formally demurring, serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the Secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing.

#### VI.

##### **Service of Papers.**

Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail; and when any party has appeared by attorney, service upon such attorney shall be deemed proper service upon the party.

#### VII.

##### **Affidavits.**

Affidavits to any pleading or application may be made before any officer of the United States, or of any State or Territory, authorized to administer oaths.

#### VIII.

##### **Amendments.**

Upon application of any party, amendments to any petition or answer, in any proceeding or investigation, may be allowed by the Commission in its discretion.

#### IX.

##### **Adjournments and Extensions of Time.**

Adjournments and extensions of time may be granted upon the application of any party in the discretion of the Commission.

#### X.

##### **Stipulations.**

The parties to any proceeding or investigation before the Commission may, by stipulation in writing filed with the Secretary,

agree upon the facts, or any portion thereof involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

## **XI.**

### **Hearings.**

Upon issue being joined by the service of an answer or notice of hearing on the petition, the Commission will assign a time and place for hearing the case, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless their testimony be taken or the facts be agreed upon as provided for in these rules. The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the carrier complained against admits the same or fails to answer the petition. The carrier must also prove facts alleged in the answer, unless admitted by the petitioner, and fully disclose its defense at the hearing.

In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Cases shall be argued orally upon submission of the testimony, unless a different time shall be agreed upon by the parties or directed by the Commission, but oral argument may be omitted in the discretion of the Commission.

## **XII.**

### **Depositions.**

The testimony of any witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Commission, and at any time after the same is at issue. The Commission may also order testimony to be taken by deposition, in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or otherwise interested in the proceeding or investigation. Reasonable notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state

the name of the witness and the time and place of the taking of his deposition, and a copy of such notice shall be filed with the Secretary.

When testimony is to be taken on behalf of a common carrier in any proceeding instituted by the Commission on its own motion, reasonable notice thereof in writing must be given by such carrier to the Commission itself, or to such person as may have been previously designated by the Commission to be served with such notice.

Every person whose deposition is taken shall be cautioned and sworn (or may affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing, which may be typewriting, by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the witness.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Secretary. All depositions must be promptly filed with the Secretary.

### XIII.

#### Witnesses and Subpœnas.

Subpœnas requiring the attendance of witnesses from any place in the United States to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Commission, or by deposition before a magistrate authorized to take the same, will, upon the application of either party, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission.

Subpœnas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will only be issued upon application in writing; and when it is sought to compel witnesses, not parties to the proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers, or documents desired; that the same are in the possession of the witness or under his control; and also, by facts stated, show that they contain material evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.



Witnesses whose testimony is taken orally or by deposition, and the magistrate or other officer taking such depositions, are severally entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.\*

#### XIV.

##### **Proposed Findings and Briefs.**

Proposed findings embracing the material facts claimed to be established by the evidence, and referring to the particular part of the record relied upon to support each finding proposed, shall be filed by each party. Printed or written arguments or briefs may be filed by any party. A copy of the proposed findings, brief, or argument filed on behalf of any party, must at the same time be served upon the adverse party or parties, personally or by mail, and notice of such service thereupon filed with the Secretary of the Commission. The time within which proposed findings and printed or written arguments or briefs shall be filed in any case will be determined by the Commission upon submission of the testimony.

#### XV.

##### **Rehearings.**

Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for a re-hearing, the petition must specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any recommendation, decision, or order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such recommendation, decision, or order which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth. Such petition must be duly verified, and a copy

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\* Fees of witnesses are fixed by law at \$1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.

thereof, with notice of the time and place when the application will be made, must be served upon the adverse party at least ten days before the time named in such notice.

#### XVI.

##### **Printing of Pleadings, etc.**

Pleadings, depositions, briefs, and other papers of importance, shall be printed or in typewriting, and when not printed only one side of the paper shall be used.

#### XVII.

##### **Copies of Papers or Testimony.**

Copies of any petition, complaint, or answer in any matter or proceeding before the Commission, or of any order, decision, or opinion by the Commission, will be furnished without charge, upon application to the Secretary by any person or carrier party to the proceeding.

One copy of the testimony will be furnished by the Commission for the use of the complainant, and one copy for the use of the defendant, without charge; and when two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

#### XVIII.

##### **Compliance with Orders against Carriers.**

Upon the issuance of an order against any carrier or carriers, after hearing, investigation, and report by the Commission, such carrier or carriers must promptly, upon compliance with its requirements, notify the Secretary that action has been taken in conformity with the order; and when a change in rates is required, such notice must be given in addition to the filing of a schedule or tariff showing such change in rates.

#### XIX.

##### **Applications by Carriers under Proviso Clause of Fourth Section.**

Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance. Such application shall be by verified petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the peti-

tioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case seem to require.

## XX.

### Information to Parties.

The Secretary of the Commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a full presentation of facts material to the controversy.

## XXI.

### Address of the Commission.

All complaints concerning anything done or omitted to be done by any common carrier, and all petitions or answers in any proceeding, or applications in relation thereto, and all letters and telegrams for the Commission, must be addressed to Washington, D. C., unless otherwise specially directed.





# FORMS.

*These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.*

## No. I.

### Complaint against a Single Carrier.

#### INTERSTATE COMMERCE COMMISSION.

A. B.  
against  
THE ——— RAILROAD COMPANY. }

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of ——— and points in the State of ———, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplemental thereto.

III. That (*here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III*).

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. (*The prayer may be varied so as to ask also for the ascertainment of lawful rates or practices and an order requiring the carrier to conform thereto. If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper.*)

Dated at ———, ——— ———, 190—.

A. B.

(*Complainant's signature.*)

## No. 2.

**Complaint against Two or More Carriers.**

## INTERSTATE COMMERCE COMMISSION.

	A. B.	}
	against	
THE ———	RAILROAD COMPANY,	
	AND	
THE ———	RAILROAD COMPANY.	

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendants above named are common carriers engaged in the transportation of passengers and property, by continuous carriage or shipment, wholly by railroad (*or partly by railroad and partly by water, as the case may be*), between points in the State of ——— and points in the State of ———, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplemental thereto.

(*Then proceed as in Form 1.*)

## No. 3.

**Answer.**

## INTERSTATE COMMERCE COMMISSION.

	A. B.	}
	against	
THE ———	RAILROAD COMPANY.	

The above-named defendant, for answer to the complaint in this proceeding, respectfully states —

I. That (*here follow the usual admissions, denials, and averments. Continue numbering each succeeding paragraph*).

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE ——— RAILROAD COMPANY.

By E. F.,  
(*Title of officer.*)



## No. 4.

## Notice of Hearing by Carrier under Rule V.

## INTERSTATE COMMERCE COMMISSION.

A. B.  
*against*  
 THE ——— RAILROAD COMPANY. }

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE ——— RAILROAD COMPANY.

By E. F.,  
 (Title of officer.)

## No. 5.

## Subpoena Duces Tecum.

To ———, ———,  
 ———, ———.

You are hereby required to appear before ——— in the matter of a complaint of ——— against ———, as a witness on the part of ———, on the ——— day of ———, 190—, at ——— o'clock —. m. at ———, and bring with you then and there ———. [*Here designate the books, papers, contracts, or documents desired to be produced.*]

Dated ———.

(Seal.)

—————,  
 Commissioner.

—————,  
 ———,  
 Attorney for ———.

(NOTICE.— Witness fees for attendance under this subpoena are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.)

## No. 6.

## Notice of Taking Depositions under Rule XII.

INTERSTATE COMMERCE COMMISSION.

	A. B.	}
	against	
THE ———	RAILROAD COMPANY.	

You are hereby notified that G. H. will be examined before C. D., a ——— (*title of officer or magistrate*), at ———, on the ——— day of ———, 190—, at ——— o'clock in the ———noon, as a witness for the above-named complainant (*or defendant, as the case may be*), according to act of Congress in such case made and provided, and the rules of practice of the Interstate Commerce Commission; at which time and place you are notified to be present and take part in the examination of the said witness.

Dated ——— ———, 190—.

I. J.

(*Signature of complainant or defendant, or of counsel.*)

(To A. B., the above-named complainant (*or The ——— Railroad Company, the above-named defendant*); or to K. L., counsel for the above-named complainant or defendant.)

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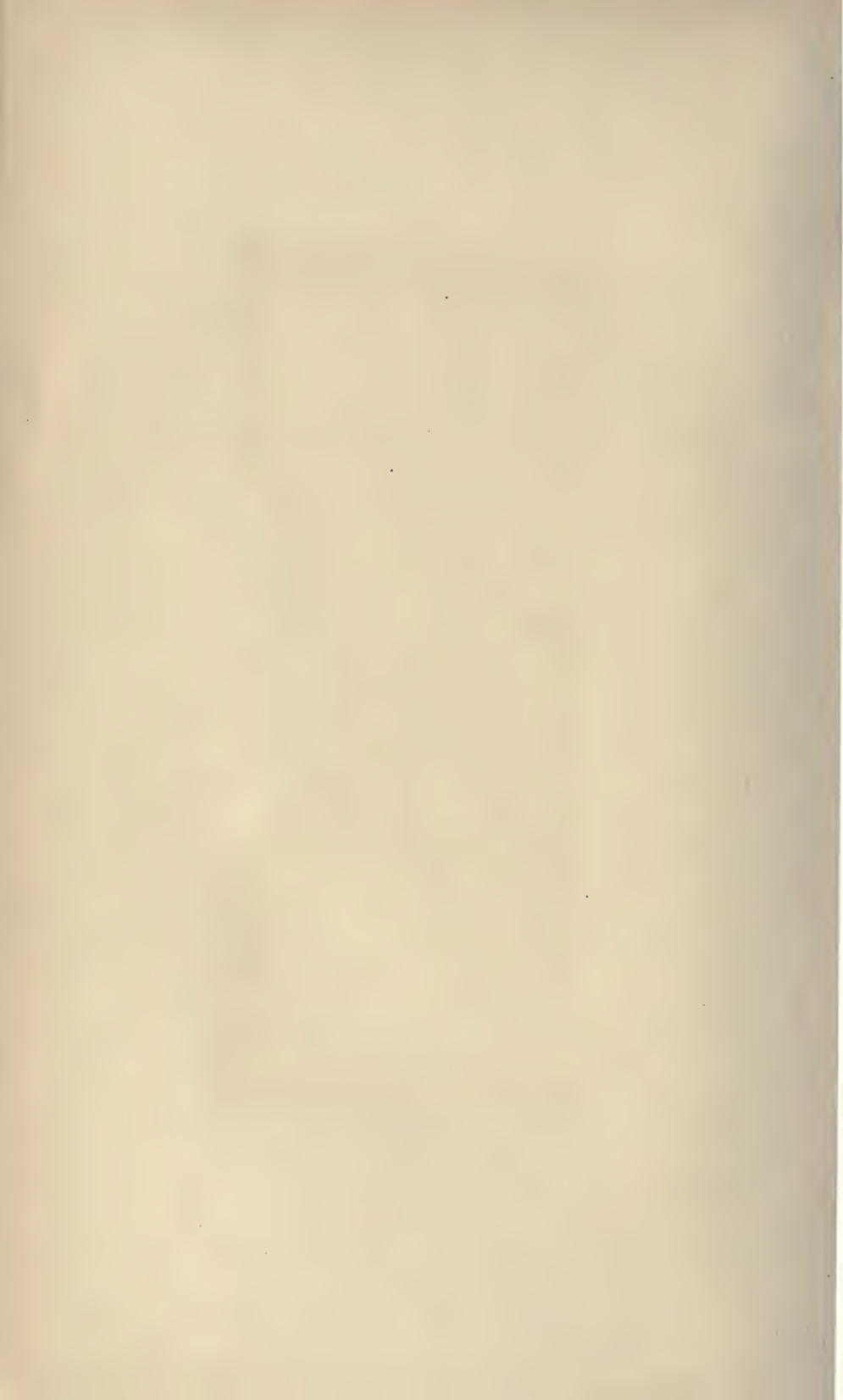
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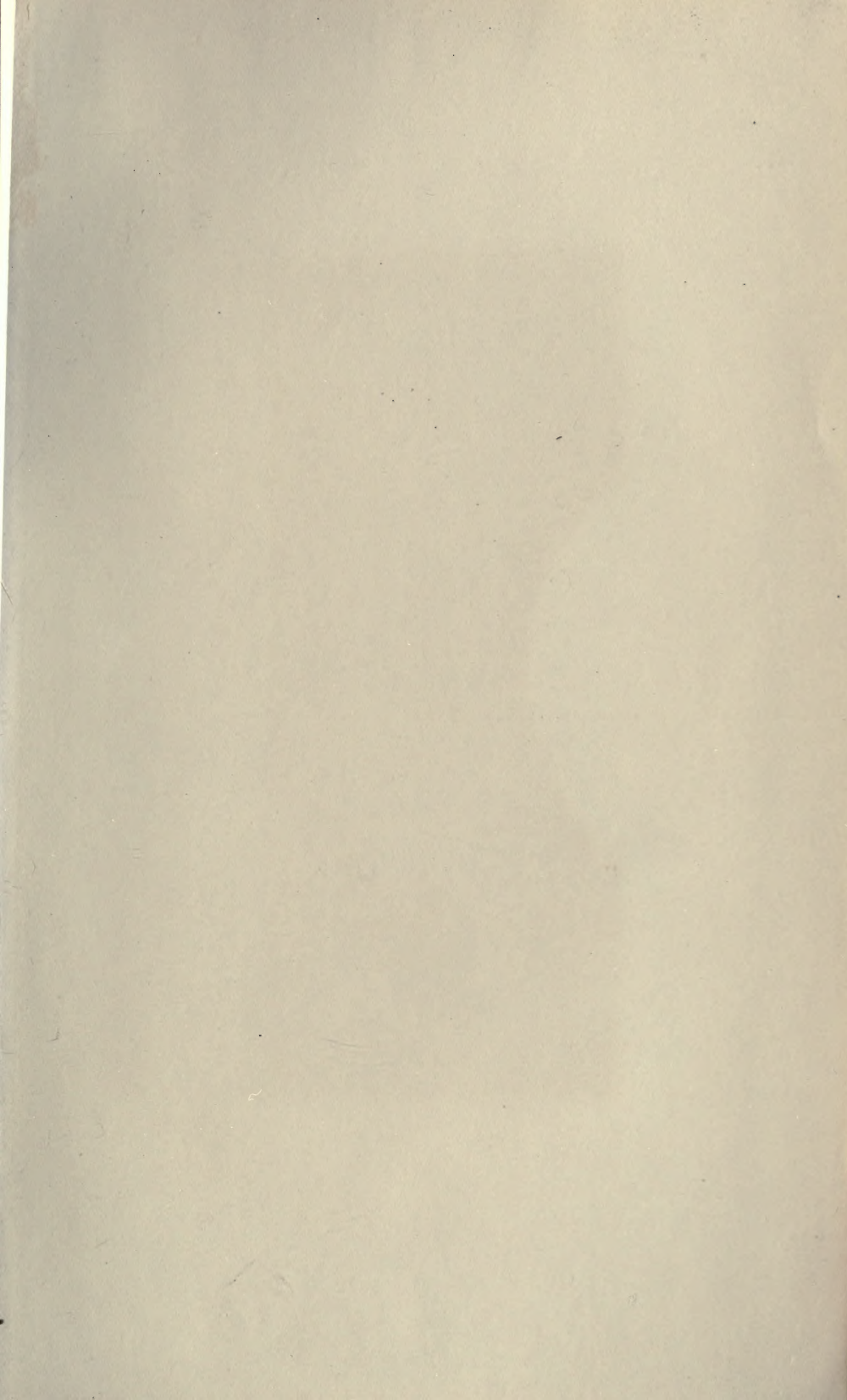


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